SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 65

CRESCENT EXPRESS LINES, INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 19-339

CRESCENT EXPRESS LINES, INC., Plaintiff,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, Intervenors

PRAECIPE FOR TRANSCRIPT OF RECORD

TO THE CLERK:

Will you please prepare a transcript of this record in the above entitled cause to be transmitted to the Supreme Court of the United States pursuant to the appeal of the plaintiff to said Court heretofore filed and allowed and incorporate in said transcript the following:

1. Summons.

2. Amended complaint.

3. Answer of the Interstate Commerce Commission to the Amended Complaint verified December 14, 1942.

4. Answer of the Interstate Commerce Commission verified November 11, 1942.

5. Answer of the United States of America to the Amended Complaint dated December 2, 1942.

6. Answer of the Intervenor, Mountain Transit Corporation to the Amended Complaint verified December 22, 1942.

7. Answer of the intervenor, Hudson Transit Lines, Inc., dated October 30, 1942.

8. Petition for Appeal and Order Allowing Appeal.

[fol. 3] 9. Assignment of Errors.

10. Statement as to Jurisdiction of the Supreme Court (with exhibits attached thereto consisting of Decree and Judgment entered by the Court; Findings of Fact and Conclusions of Law, Opinion of the Court, copy of order of Interstate Commerce Commission dated September 2, 1941 and copy of order of Interstate Commerce Commission dated June 20, 1938).

11. Citation on Appeal.

12. Notice of Appeal.

13. Notice to the Attorney General of the State of New York and proof of service.

14. Affidavit of service of George H. Rosen, verified April 21, 1943 showing service of papers on the Attorney General.

15. Certified transcript of record before Interstate Commerce Commission.

16. Affidavit of Beatrice Martin showing proof of service of papers.

17. Praecipe for Transcript of Record.

18. Clerk's certificate.

Dated: April 21, 1943.

George H. Rosen, Attorney for Plaintiff, Office & P. O. Address, 302 Broadway, Borough of Manhattan, New York City.

[fols. 4-5] In District Court of the United States

[Title omitted]

Summons—Filed October 7, 1942

To the above named Defendant:

You are hereby summoned and required to serve upon George H. Rosen, plaintiff's attorney, whose address 302 Broadway, New York City, an answer to the complaint which is herewith served upon you, within 60 days after service of

this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk. By —— ——, Deputy Clerk. (Seal of Court.)

Date: 9/30/42.

[fol. 6] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC., Plaintiff,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

AMENDED COMPLAINT—Filed December 11, 1942

Comes now Crescent Express Lines, Inc., plaintiff herein by George H. Rosen, its attorney, and respectfully shows unto the Court as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of New York, having its principal office in the City of New York, State of New York, in this District.

2. The United States of America is a political entity against which by general Act of Congress this suit may be brought to annul, set aside and enjoin enforcement of an order of the Interstate Commerce Commission.

3. The Interstate Commerce Commission is a statutory tribunal created by Act of Congress on February 4, 1887, and is, by further general Act of Congress, permitted to be named as an additional defendant in suits of this character respecting the validity of its orders.

4. This suit is brought under the provisions of the United States Code Title 28 Sec. 41 (28) to enjoin, suspend, set aside and annul an order of the Interstate Commerce Commission, Division 5 dated September 2, 1941, a copy of which is annexed hereto marked Exhibit "A", and the

[fol. 7] order of the Commission dated March 17, 1942, a copy of which is annexed hereto marked Exhibit "B", and the order of the Commission dated July 13, 1942, a copy of which is annexed hereto marked Exhibit "C".

5. That Crescent Express Lines, Inc., operates motor vehicles for the transportation of passengers for hire between points in the City of New York, New York, to various points in Sullivan and Ulster Counties, State of New York via the State of New Jersey and which operations were conducted prior to and since June 1, 1935.

6. At all times hereinafter mentioned and now the aforesaid transportation of passengers for hire has been conducted as a common carrier by motor vehicle within the purview of the Motor Carrier Act of 1935.

7. That predecessors of plaintiff duly filed an application with the Interstate Commerce Commission under the Motor Carrier Act of 1935, and "grandfather" operating rights were claimed under the provisions of the said Motor Carrier Act applicable thereto and the Interstate Commerce Commission assigned file number MC 78980 to the said application.

8. Thereafter said operating rights were purchased by plaintiff, and the Interstate Commerce Commission, on or about October 31, 1940 duly substituted plaintiff as the person entitled to said rights, and plaintiff was and now is entitled to the operating rights in the within matter.

9. That heretofore and on or about June 20, 1938 the Interstate Commerce Commission issued its order dated June 20, 1938 granting operating rights to plaintiff's predecessors as more fully set forth therein, a copy of which is annexed hereto and marked Exhibit "D", and [fol. 8] whereby the said Commission granted "grandfather" rights to operate as follows:

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive
> * * *."

10. That on or about September 2, 1941 without any further evidence or hearing, the Commission by Division 5 made a new order changing the rights granted as set forth in said order, a copy of which is annexed hereto marked Exhibit "A" whereby rights were granted to the plaintiff as follows:

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1, to October 1, inclusive, over irregular routes * * *."

11. That thereafter pursuant to the statute and rules of the Interstate Commerce Commission, applicable thereto and within the time prescribed therefor, plaintiff filed objections and protest to said order of September 2, 1941 but the said objections and protest were denied by the Commission by its order of March 17, 1942, a copy of which is annexed hereto marked Exhibit "B".

12. That thereafter and pursuant to the statute and rules of the Interstate Commerce Commission, applicable thereto and within the time prescribed therefor, plaintiff duly filed its petition with the Interstate Commerce [fol. 9] Commission asking for reconsideration by the whole Commission of the order dated September 2, 1941, or for a hearing, by petition dated April 3, 1942, but the said Interstate Commerce Commission denied said petition for reconsideration or hearing by order dated July 13, 1942, a copy of which order is annexed hereto and made a part hereof marked Exhibit "C", and that plaintiff has exhausted all proceedings available or allowed to it before the said Interstate Commerce Commission pursuant to the statute and rules in such case made and provided.

13. That operations of the plaintiff and/or its predecessors on June 1, 1935 and subsequent thereto down to the present time were over the route or routes or within the

territory for which the application was made and has been so operated since that time.

14. Upon information and belief that the Interstate Commerce Commission has in the within proceeding exceeded its statutory power granted by the Motor Carrier Act of 1935 and amendments thereto as the same is applicable in making the order of September 2, 1941, (a) by limiting or restricting the rights granted by its order of September 2, 1941 so that plaintiff should transport not more than six passengers in any one vehicle, but not including the driver thereof and not including children under ten years of age who do not occupy a seat or seats; (b) by limiting or restricting the rights granted by its order of September 2, 1941 to door-to-door service; (c) by limiting or restricting operations over irregular routes; (d) by limiting or restricting the rights granted by its order of September 2, 1941 to non-scheduled operations; and (e) by limiting or restricting the rights granted by its order of September 2, 1941 to "special operations."

15. That the said order of September 2, 1941 made by [fol. 10] said Interstate Commerce Commission was contrary to law and in excess of the power of the said Commission, and upon informati and belief was made for the purpose of restricting and limiting plaintiff to the use of 7 passenger sedans as distinguished from larger size vehicles despite the fact that the Motor Carrier Act of 1935 and amendments thereto, provides that no terms, conditions or limitations shall restrict the rights of the carrier to add to its equipment and facilities as the development of the business and the demands of the public shall require, and despite the fact that said statute does not limit motor vehicles to any particular type; that said alleged restrictions were made to circumvent the law and to act outside the provisions of the law, and to that end said Commission acted illegally, unconstitutionally, and its order of September 2, 1941 so far as it restricts the rights granted should be enjoined, set aside, suspended and annulled, and the order of June 20, 1938 reinstated.

16. Upon information and belief there is no factual or legal basis for limiting the rights granted to transport only six passengers besides the driver or children under ten years of age; that the restriction preventing the plaintiff

from transporting more than 6 adult passengers and granting authority to transport any number of children under ten years of age who do not occupy seats has no proper basis because it fails to take into consideration that a large number of children under ten years of age might require transportation with their parents necessitating the use of larger vehicles, and even though the said children remained standing up for the duration of the trip, the empty seats could not be used for fare-paying passengers.

17. The tariffs filed with the said Commission under its rules and regulations permit a charge of one-half fare for children between 5 and 12 years of age.

[fol. 11] 18. The distance between New York and Monticello one of the principal towns in the County of Sullivan, is about 95 miles and a child for whom half fare was paid needs and is entitled to a seat for a trip of such a distance and the order of September 2, 1941 by making the restriction aforesaid, would bar and prevent such a child or children from having a seat or seats all in contravention of ordinary safety and health requirements for the transportation of such children.

19. The said order of September 2, 1941 is unlawful and illegal, and without proper foundation insofar as it restricts the operating rights to non-scheduled rights, and such provision is directly contrary to the provisions of the order of June 20, 1938; the conclusions made by the Commission and contained in the order of the Commission dated June 20, 1938 were correct, but the action of the Commission in making the order dated September 2, 1941 was incorrect, illegal and void because it was not based upon any new, additional or different evidence as no further hearings were held and therefore no facts were before the Commission sufficient to sustain said order of September 2, 1941, and further there is nothing in the Motor Carrier Act of 1935 or amendments thereto or in the rules and regulations of the Interstate Commerce Commission referring to schedules or requiring schedules and the inclusion or restriction to non-scheduled operation was not within the scope of the statute, and was unreasonable and arbitrary.

20. The order of September 2, 1941 is incorrect, illegal and void by the attempted restriction to door-to-door serv-

ice because many passengers go to stations maintained by plaintiff, which are within the towns and villages served by plaintiff and the order of September 2, 1941 makes no [fol. 12] provision for such passengers.

21. That the order of September 2, 1941 is incorrect, illegal and void by the restriction of the plaintiff to the use of irregular routes and that the same is contrary to the statute and the geographical conditions in the area in which operations are conducted.

22. Upon information and belief that the order of September 2, 1941 in allegedly describing the rights granted as "special operations" is arbitrary and illegal and such words "special operations" are meaningless, inapplicable, and improper in the within proceeding as the words "special operations" are vague, uncertain and ambiguous, and prejudice the rights of the plaintiff by subjecting it to whatever future construction may be placed thereon by the Commission as no present and proper purpose is supplied by such terminology nor is there any factual basis or finding to support same.

23. Plaintiff respectfully shows unto this Court that the said order of the Interstate Commerce Commission hereinabove mentioned dated September 2, 1941, and the order denying reconsideration thereof are as a matter of law, and fact, illegal and unlawful in that the said Commission acted arbitrarily, illegally and without any evidence to support same, and that the Commission acted in excess of its statutory authority; that said orders as aforesaid are not sustained by any findings, or by any evidence; and are contrary to the terms and provisions of the Motor Carrier Act of 1935; that said orders deprive the plaintiff of its rights to a certificate as set forth in the order of the Commission dated June 20, 1938, and the order of September 2, 1941 and the orders of March 17, 1942 and July 13, 1942 denying reconsideration or a hearing herein, take and deprive the [fol. 13] plaintiff of its property without due process of law and in violation of the Fifth Amendment to the Constitution of the United States and are illegal and void.

24. That plaintiff will suffer irreparable injury and financial loss if it is compelled to transport only six adult paying passengers in a vehicle at one time.

Wherefore it is respectfully prayed:

(a) That process be issued against the defendants;

(b) That the order of September 2, 1941 be vacated, annulled and set aside as contrary to law and its enforcement enjoined and the order of June 20, 1938 be reinstated and that a certificate be issued to plaintiff in accordance with the said order of June 20, 1938;

(c) That in the alternative, that the order of September 2, 1941 be vacated, annulled and set aside as contrary to law and fact, and that the matter be remanded to the Interstate Commerce Commission for hearing and proof with respect to the issues herein, or that hearings be conducted by this Court with respect to such issues;

(d) That a temporary injunction should be issued if the same shall be necessary.

(e) That the plaintiff may have such other and further relief as the facts shown and to be shown may require.

George H. Rosen, Attorney for Plaintiff, Office & P. O. Address, 302 Broadway, Borough of Manhattan, New York City.

[fol. 14] Exhibit "A" to Amended Complaint

C-2 Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 2nd day of September, A. D. 1941.

No. MC 78980

Application of Crescent Express Lines, Inc., New York, New York

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity upon compliance with the terms of the said order; that protests or exceptions to said order having been duly filed; and further consideration having been had;

It further appearing, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor

vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Interstate Commerce Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* and upon filing appropriate publications providing for the cancellation of any effective rates or charges applying to transportation service in excess of that herein or otherwise lawfully authorized, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order,* unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

[fol. 15] *It is further ordered,* That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order* a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with

the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

(Seal.) W. P. Bartel, Secretary.

Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 2nd day of September, A. D. 1941.

No. MC 78980

Application of Crescent Express Lines, Inc., New York, New York

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

[fol. 16] Exhibit "B" to Amended Complaint

Order ID-142

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 17th day of March, A. D. 1942.

No. MC 78980

Application of Crescent Express Lines, Inc., New York New York

This proceeding coming on for further consideration:

It appearing, That a petition has been filed by applicant objecting to the order of September 2, 1941, issued herein;

and further consideration having been had, and good cause appearing therefor;

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission, division 5.

(Seal.) W. P. Bartel, Secretary.

[fol. 17] EXHIBIT "C" TO AMENDED COMPLAINT

Order ID-142

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of July, A. D., 1942.

No. MC 78980

CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

Upon consideration of the record in the above-entitled proceeding and petition filed by applicant against the order issued March 17, 1942; and good cause appearing therefor;

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission, W. P. Bartel, Secretary. (Seal.)

[fol. 18] EXHIBIT "D" TO AMENDED COMPLAINT

Order C-2

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 20th Day of June, A. D. 1938

No. MC-78980

Application of HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY and MORRIS GLICKMAN, A Partnership, Doing Business as Crescent Mountain Service, Bronx, New York.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, includ-

ing due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public,* a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby denied, *and that on and after 30 days from date of this order,* unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceeding.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order,* a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

[fols. 19-21] *And it is further ordered,* That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compli-

ance with the requirements therein specified, be and it is hereby, vacated and set aside.

By the Commission, division 5. W. P. Bartel, Secretary. (Seal.)

Appendix to the order of the

Interstate Commerce Commission, Division 5, dated the

20th day of June, A. D. 1938

No. MC 78980

Application of Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a Partnership, Doing Business as Crescent Mountain Service, Bronx, New York

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:

Between New York, N. Y., and Woodbourne, N. Y.:

From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne, and return over the same route.

Intermediate and off-route points within 20 miles of Woodbourne.

[File endorsement omitted.]

[fol. 22] In District Court of the United States

[Title omitted]

Answer of Interstate Commerce Commission to Amended Complaint—Filed Dec. 15, 1942

The Interstate Commerce Commission, one of the defend-

ants in the above-entitled cause, for answer to the amended complaint, answers and says:

I

The Commission adopts the allegations of paragraphs VII and X of its answer to the original complaint, as its answer to the allegations of paragraphs 10 and 14 of the amended complaint.

II

Answering the allegations of paragraph 21 of the complaint as amended, the Commission denies the same.

III

Answering the allegations of paragraphs 22, 23 and 24 of the amended complaint, the Commission denies the same.

[fol. 23] Interstate Commerce Commission, by E. M. Reidy, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Wm. J. Patterson. Jurat omitted in printing.

[fol. 24] In the District Court of the United States

[Title omitted]

Answer of Interstate Commerce Commission—Filed Nov. 12, 1942

The Interstate Commerce Commission, one of the defendants in the above-entitled case, for answer to the complaint, answers and says:

I

Answering paragraphs 1 to 4, inclusive, of the complaint, the Commission admits, for the purposes of this suit, the truth of the allegations thereof.

II

Answering paragraph 5 of the complaint, the Commission denies the allegations thereof to the extent that they are

inconsistent with statements and conclusions contained in its order of September 2, 1941, attached to and made a part of the bill of complaint as Exhibit "A", to which reference is hereby made.

III

Answering paragraph 6 of the complaint, the Commission denies the allegations thereof.

[fol. 25]

IV

Answering paragraph 7 of the complaint, the Commission admits the allegations therein contained.

V

Answering paragraph 8 of the complaint, the Commission admits that it permitted substitution of plaintiff for plaintiff's predecessors-in-interest as entitled to whatever operating rights said predecessors-in-interest were found by the Commission to possess. The Commission avers that said plaintiff appears to be merely the corporate identity of individuals named in the original application.

VI

Answering paragraph 9 of the complaint, the Commission admits the issuance by it of the order of June 20, 1938, referred to in said paragraph. In this connection, the Commission alleges that said order never became effective because of protests filed immediately by competing carriers, following the receipt of which the Commission, on its own motion, referred the case back to its field force for further investigation to the end that the Interstate Commerce Commission should not issue a certificate for a type of operation not conducted by plaintiff's predecessors on and prior to the grandfather date.

VII

Answering the allegations of paragraph 10 of the complaint, the Commission admits the issuance by it of the order of September 2, 1941, referred to in said paragraph. The Commission denies such action was "without any further evidence or hearing", and alleges that by the order of September 2, 1941, plaintiff secured operating rights

[fol. 26] similar to those sought for in the applications of its predecessors and like those alleged by plaintiff's predecessors to have been conducted on and prior to June 1, 1935, the grandfather date.

VIII

Answering paragraphs 11 and 12 of the complaint, the Commission admits the allegations thereof.

IX

Answering the allegations of paragraph 13 of the complaint, the Commission denies the same, and alleges that plaintiff and/or its predecessors asked for and proved at an informal hearing, rights to operate in a territorial service, which was a flexible service, rendered in 7-passenger sedans, essentially a door-to-door service in character, and not a service over regular routes and between fixed termini.

X

Answering the allegations contained in paragraphs 14 and 15 of the complaint, the Commission denies the same. In this connection, the Commission alleges that it performed its statutory obligations under Section 208A, which require it to specify in its grant of Grandfather operating rights the same type of service conducted by the applicant on the Grandfather date in order to preserve substantial parity between the Grandfather operations and those operations authorized by the Commission's order, and further alleges that each item contained in the specification or description of the type of service in the order of September 2, 1941 constitutes an essential, integral and necessary part of such specification in order to fully and adequately comply with the statutory mandate.

[fol. 27]

XI

Answering the allegations contained in paragraph 16 of the complaint, the Commission denies the same.

XII

Answering the allegations contained in paragraph 17 of the complaint, the Commission admits the same.

XIII

Answering the allegations contained in paragraph 18 of the complaint, the Commission, for the purpose of this suit, admits that the distance from New York City to Monticello is 95 miles. Answering the other allegations of the paragraph, the Commission alleges that plaintiff misconstrues that part of the Commission's specifications, and that there is nothing to prevent a child paying a fare from occupying one of the six seats, and alleges that the provision concerning children was incorporated so as not to prohibit small children from sitting on their parents' laps in making the journey.

XIV

Answering the allegations contained in paragraph 19 of the complaint, the Commission denies the same. In this connection, the Commission alleges that the operating authority granted by the Commission in its order of September 2, 1941 is similar to that sought and proved by plaintiff's predecessors as having been operated on the Grandfather date.

XV

Answering the allegations of paragraph 20 of the complaint, the Commission denies the same.

[fol. 28]

XVI

Answering the allegations of paragraph 21 of the complaint, the Commission denies the same, and alleges that by reason of the type of operations proven by plaintiff's predecessors no certificate other than a certificate for special operations could be authorized by reason of the provisions of Section 206a of the Act.

XVII

Answering the allegations of paragraphs 22 and 23 of the complaint, the Commission denies the same. The Commission denies that its order is void for reasons set forth in said paragraphs, or for any other reason. The Commission further denies that plaintiff will suffer irreparable injury and financial loss if it is compelled to transport only six adult paying passengers in a vehicle at one time.

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in its order of September 2, 1941, hereinbefore referred to.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By E. M. Reidy, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fols. 29-30] *Duly sworn to by Wm. J. Patterson; jurat omitted in printing.*

[fol. 31] In District Court of United States

[Title omitted]

Answer of the United States to Amended Complaint

Now comes the United States and for answer to the amended complaint herein says:

1. In answer to paragraphs 1 through 20 of the amended complaint, adopts by reference paragraphs Nos. I through XV of the answer of the Interstate Commerce Commission, dated November 11, 1942, to the original complaint.

2. Denies the allegations of paragraphs 21 through 24 of the amended complaint.

Wherefore, it is respectfully requested that the amended complaint be dismissed.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C. Thurman Arnold, Assistant Attorney General.

[fol. 32] I hereby certify that copies of the foregoing answ[illegible]ve this day been served upon the following parties by m[illegible]:

Edward M. Reidy, Esq., Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

George H. Rosen, Esq., 302 Broadway, New York, New York.

James F. X. O'Brien, Esq., 17 Academy Street, Newark, New Jersey.

Henry P. Goldstein, Esq., 1450 Broadway, New York, New York.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

December 2, 1942.

[fol. 33] In United States District Court

[Title omitted]

Answer of Intervenor to Amended Complaint—Filed December 24, 1942

Comes now intervenor, Mountain Transit Corporation, by Henry P. Goldstein, its attorney, and in answer to the amended complaint herein alleges as follows:

I

Admits each and every allegation of the complaint herein marked, "1", "2", "3", "4", "7", "8" and "12".

II

Denies each and every allegation of the complaint herein marked, "5", "13", "14", "15", "16", "18", "19", "20", "21", "22", "23" and "24".

III

Denies any knowledge or information sufficient to form a belief as to the allegations of the complaint herein marked "17".

IV

Denies each and every allegation of the complaint herein marked "6" except that it admits that on June 1, 1935, and up until May 1941, plaintiff's predecessor has conducted the business of transportation of passengers for hire as a common carrier by motor vehicle within the purview of the Motor Carrier Act of 1935 to the extent and in

the manner described in the order of the Interstate Com-
[fol. 34] merce Commission dated September 2, 1941, and referred to in the complaint as Exhibit A.

V

Denies each and every allegation of the complaint herein marked "9" except that it admits that on or about June 20, 1938, the Interstate Commerce Commission issued an order directing that upon full compliance with the requirements of Sections 215, 216 and 217 and the rules and regulations prescribed by the Commission thereunder, that a certificate be issued, "unless otherwise ordered," authorizing the plaintiff herein to engage in interstate or foreign commerce as a common carrier according to the specification set forth as appended on the reverse side of said order, and that said order further directed, "any other party in interest who desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission within 30 days from the date of this order a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission." That parties protestant in the proceedings before the Commission filed timely Exceptions to the order and subsequently the Commission set aside said order.

VI

Denies each and every allegation of the complaint herein marked "10" except that it admits that on or about September 2, 1941, the Commission made its order, Exhibit A, wherein it directed, amongst other things, "That the previous order issued in this proceeding describing the authority to which applicant has been found to be entitled upon compliance with the requirements therein specified be and it is hereby vacated and set aside."
[fol. 35] That the order of September 2, 1941, marked Exhibit A in the complaint, was issued as the result of proceedings before this Commission as described in paragraph "V" of the answer herein and more specifically as follows:

(a) Filing of Exceptions to and Petition to Stay Issuance of Certificate by protestants, Yelloway Transportation

Corporation, Eastern Capitol Lines Inc., and Flying Eagle Coach Corporation (predecessors to Mountain Transit Corporation, intervenor herein) to the order of June 20, 1938, Exhibit D in the complaint.

(b) Submission to the Commission in informal proceedings of evidence, data, and affidavits in support of the application pending before the Commission by the plaintiff's predecessors, at which times the applicant was afforded informal hearings in the presence of Protestant's representatives.

(c) Such other proceedings as appear in the record.

VII

Denies each and every allegation of the complaint herein marked "II" except that it admits that on or about October 9, 1941, the plaintiff herein, as successor to the original applicant, filed, "Protest of Crescent Express Lines, Inc. and Petition to Stay Issuance of Certificate in the within matter," wherein it was prayed, amongst other other things, that the said compliance order, dated September 2, 1941, should be vacated and set aside and the compliance order of June 20, 1938, reinstated. No request or demand was made therein for formal hearing or any opportunity to submit additional evidence or data.

That Hudson Transit Lines on or about October 18, 1941, and Mountain Transit Corporation on or about October 16, 1941, as protestants therein, filed their respective replies to said protest and petition, and that on March 17, [fol. 36] 1942, after deliberation and consideration, the Commission made its order wherein it stated, amongst other things, "this proceeding coming on for further consideration" and therein denied plaintiff's petition. (Exhibit B of complaint).

Wherefore, it is respectfully prayed that the prayer for relief in all respects be denied and that the conrplaint herein be dismissed.

Henry P. Goldstein, Attorney for Intervenor Defendant, Office & P. O. Address, 1450 Broadway, Borough of Manhattan, City of New York.

[fols. 37-39] [File endorsement omitted.]

Duly sworn to by Theodore J. Richmond; jurat omitted in printing.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO INTERVENE—Filed November 16, 1942

To George H. Rosen, Attorney for Plaintiff, and E. M. Reidy, Assistant Chief Counsel and Attorney for Interstate Commerce Commission, Defendant, and Robert L. Pierce, Special Assistant to the Attorney General and Attorney for Defendant, United States of America.

SIRS:

Please Take Notice that Hudson Transit Lines, Inc., through its attorney, the undersigned, will apply to this Court on the tenth day of November, 1942, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the United States Court House, Foley Square, in the Borough of Manhattan, and City of New York, New York, for leave to intervene as a defendant in the above entitled action pursuant to the provisions of the United States Code, Title 28, Section 45A, in order to assert the defenses set forth in its proposed Answer, copy of which is annexed hereto, and in support of such motion urges that Hudson [fol. 41] Transit Lines, Inc. is a corporation engaged pursuant to the laws of the United States and the rules and regulations of the Interstate Commerce Commission in the business of carrying passengers, etc. for hire as a common carrier, and that the operations of the plaintiff herein are competitive in part of the same territory served by said Hudson Transit Lines, Inc., which has a substantial interest in the subject matter of this action, and further that said Hudson Transit Lines, Inc. was a party in interest to the proceedings before the defendant, Interstate Commerce Commission, which resulted in the order which the plaintiff, by this action, seeks to have annulled and set aside, and in connection with which they seek to enjoin enforcement of said order.

Dated: October 30, 1942.

James F. X. O'Brien, 17 Academy Street, Newark, New Jersey. Attorney for Hudson Transit Lines, Inc.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENOR, HUDSON TRANSIT LINES, INC.—Filed November 16, 1942

Hudson Transit Lines, Inc., a corporation, intervenor in the above entitled action, respectfully answers the complaint filed therein as follows:

1. It admits the allegations contained in Paragraphs 1, 2, 3 and 4 of the complaint.

2. It denies the allegations contained in Paragraph 5 of the complaint except that it admits plaintiff did, on or about June 1, 1935, conduct special irregular route radial operations with seven passenger sedans, conducting a type of operation of an interstate livery character, and that plaintiff continued said operations seasonally until the 1940 summer season, after which time plaintiff abandoned said operations and thereafter conducted occasional and sporadic operations during the summer seasonal period of a totally different character, to wit, a regular route operation between fixed termini operated with large buses.

3. It denies the allegations contained in Paragraph 6 of the complaint.

[fol. 43] 4. It admits the allegations contained in Paragraph 7 of the complaint.

5. It denies the allegations contained in Paragraph 8 of the complaint except that it admits there is some record of a sale and transfer from the partnership doing business under the names, Crescent Cadillac Lines and Crescent Mountain Lines, and Crescent Express Lines, to a corporation known as Crescent Express Lines, Inc., and which last mentioned corporation had as its president one Max Eranger, whom the transfer alleged to have been employed as dispatcher and general manager in the transportation business since 1925.

In connection with said transfer, this answering defendant alleges that such transfer was merely one of the steps taken in connection with a plan of Mohawk Lines, Inc., which is controlled by one Benjamin Casser and associates, to get control of Crescent Express Lines, Inc. in their endeavor to

secure an attempted justification for the continuance of regular route bus operations between fixed termini in line with previous attempts made by this same group in connection with Royal Cadillac Service, Inc. and Reliable Cadillac Lines, Inc., and Albert Barber.

This answering defendant further alleges that said Mohawk Lines did file application to control Crescent Express Lines, but when confronted with opposition at the hearing refused to proceed and petitioned for dismissal of the application for control without prejudice, which petition was granted to the extent that the application was dismissed, but not dismissed without prejudice.

[fol. 44] This answering defendant further alleges that said group has, since the spring of 1941, controlled plaintiff contrary to the law and the regulations of the Interstate Commerce Commission, and has conducted plaintiff's operations not according to the authority permitted by the Interstate Commerce Commission, nor along the lines, or of the same type as plaintiff's Grandfather operations, but on the contrary has conducted them illegally as regular route bus operations between fixed termini, without ever having authority from the Interstate Commerce Commission for such operations, and meanwhile abandoned all operations of the Grandfather type.

For these reasons, this defendant denies that plaintiff is entitled to the claimed operating rights.

6. It denies the allegations contained in Paragraph 9 of the complaint, except that it admits that on or about June 30, 1938 the Interstate Commerce Commission issued an order directing that certain operating rights be granted to plaintiff's predecessors, but alleges that the said order never became effective because of protests immediately made by this defendant and other protesting carriers, which protests the Commission immediately recognized to be valid protests, so that the Commission, after receipt of same, on its own motion, referred the case back to the field for further investigation to the end that the Commission should not issue a certificate for a type of operation not conducted by plaintiff's predecessors on and prior to the Grandfather date.

[fol. 45] 7. It denies the allegations set forth in Paragraph 10, and alleges that plaintiff's predecessors never got any rights granted by the order of June 20, 1938, and admits

that the said order of September 2, 1941 was issued by which plaintiff got operating rights exactly like those sought for in the application of its predecessors and like those alleged by plaintiff's predecessors to have been conducted on and prior to the Grandfather date, June 1, 1935.

8. It admits the allegations contained in Paragraphs 11 and 12 of the complaint.

9. It denies the allegations contained in Paragraph 13 of the complaint.

10. It denies the allegations contained in Paragraph 14 of the complaint, and alleges that the Interstate Commerce Commission performed its statutory obligations under Section 208A, which require it to specify in its grant of Grandfather operating rights the same type of service conducted by the applicant on the Grandfather date in order to preserve substantial parity between the Grandfather operations and those operations authorized by the Commission's order, and further alleges that each item contained in the specification or description of the type of service in the order of September 2, 1941 constitutes an essential, integral and necessary part of such specification in order to fully and adequately comply with the statutory mandate.

11. It denies the allegations contained in Paragraph 15 of the complaint and alleges that the specification contained in the description of plaintiff's Grandfather type of service, to wit, the transportation of not more than six passengers in any one vehicle, was a necessary and integral part of the type of service conducted by plaintiff's predecessors on the Grandfather date in order to provide the flexible livery type service not possible with a larger vehicle, and that in so including such specification, the Commission was merely [fol. 46] complying with the statutory mandate contained in Section 208A of the Act requiring it to specify the service to be rendered.

12. It denies the allegations contained in Paragraph 16 of the complaint.

13. It has no knowledge of the allegations contained in Paragraph 17 of the complaint, and therefore neither affirms nor denies the same but leaves plaintiff to its proper proof.

14. It denies the allegations contained in Paragraph 18 of the complaint and alleges that plaintiff is misconstruing

that part of the Commission's specifications, and that there is nothing to prevent a child paying a fare from occupying one of the six seats, and alleges that the provision concerning children was incorporated so as not to prohibit small children from sitting on their parents' laps in making the journey.

15. It denies the allegations contained in Paragraph 19 of the complaint, and alleges that the operating authority granted by the Commission in its order of September 2, 1941 is similar to that sought and proved by plaintiff's predecessors as having been operated on the Grandfather date.

16. It denies the allegations contained in Paragraph 20 of the complaint.

17. It denies the allegations contained in Paragraph 21 of the complaint, and alleges that by reason of the type of operations proven by plaintiff's predecessors not certificate other than a certificate for special operations could be authorized by reason of the provisions of Section 207A of the Act.

[fols. 47-48] 18. It denies the allegations contained in Paragraphs 22 and 23 of the complaint.

19. It alleges that plaintiff and its predecessors have been given fair hearing on fact and law by the Interstate Commerce Commission, and that the findings and conclusions as contained and implied in the Commission's order of September 2, 1941 are fully supported and justified by the proof and evidence submitted by the plaintiff's predecessors, and that in reaching the conclusions contained in its said order the Commission considered and weighed carefully in the light of its knowledge and experience the facts circumstances and conditions existing in connection with the case, to which was applied the pertinent law as laid down by the Commission and courts of this land, and further alleges that the said order was not made arbitrarily or unjustly or without proof, and that the Commission did not exceed the authority conferred upon it by law in making said order.

Dated: October 30, 1942.

James F. X. O'Brien, 17 Academy Street, Newark, New Jersey; Attorney for Hudson Transit Lines, Inc.

[fol.49] In United States District Court, Southern District of New York

Civil Action. No. 19-339

Crescent Express Lines, Inc., Plaintiff,

against

United States of America and Interstate Commerce Commission, Defendants,

and

Hudson Transit Lines, Inc., and Mountain Transit Corporation, Intervenors

Before L. Hand, Circuit Judge and Caffey and Hulbert, District Judges.

Decree—February 27, 1943

This cause came on to be heard at the January, 1943, term of this court, and was argued by counsel, and thereupon upon consideration thereof, it is

Ordered, Adjudged and Decreed, that the amended complaint herein be, and the same hereby is dismissed upon the merits with costs.

Dated, February 27th, 1943.

Learned Hand, United States Circuit Judge; Francis G. Caffey, United States District Judge; Hulbert, United States District Judge.

[fol. 50] In United States District Court, Southern District of New York

Civil Action. No. 19-339

Crescent Express Lines, Inc., Plaintiff,

against

United States of America and Interstate Commerce Commission, Defendants,

and

Hudson Transit Lines, Inc., and Mountain Transit Corporation, Intervenors

Findings of Fact and Conclusions of Law

The Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The plaintiff was carrying passengers by motor for hire on June 1, 1935, and thereafter from New York City through New Jersey to points and places in Sullivan and Ulster Counties, New York.

2. Its route was from the Borough of the Bronx over the Washington Bridge, thence by Routes 4 and 2 in New Jersey and Route 17 in New York, to Wurtsboro whence it delivered its passengers within 20 miles of Woodbourne, New York.

3. The plaintiff carried its passengers in both directions daily during the season authorized, but only in cars such as those described in the eighth finding, picking them up at their houses and dropping them at their hotels or boarding houses; and vice versa. In some cases it picked them up at an "office" at 531 East 169th Street, in the Bronx, or at a fixed station in Woodbourne.

4. That part of the route which was between New York and Wurtsboro was always over the same roads.

[fol. 51] 5. The plaintiff's operations were not upon any schedule.

6. Before changing the certificate granted on June 20, 1938, the Commission gave notice to the plaintiff of a new hearing, but it did not take any additional evidence to support the order of September 2, 1941.

7. The certificate issued on September 2, 1941 truthfully "specifies" the service rendered by the plaintiff and its predecessors as of June 1, 1935.

8. The certificate restricts the plaintiff to the use of cars, capable of carying not more than six passengers, not including the driver and children under 10 years of age who do not occupy a seat or seats.

Conclusions of Law

1. The order of September 2, 1941 was adequately supported by evidence.

2. The Commission lawfully restricted the equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935.

3. The restriction in the certificate upon plaintiff's service to non-scheduled operations was lawful; so too was the certificate's description of the authorized route as "special" and "irregular"; and the service as "door-to-door"; but the last description does not forbid the plaintiff from picking up passengers at 531 East 169th Street in the Bronx, or at any fixed station in Sullivan County, or at any other station.

4. The amended complaint should be dismissed upon the merits with costs.

Dated, February 27th, 1943.

Learned Hand, United States Circuit Judge; Francis G. Caffey, United States District Judge; Hulbert, United States District Judge.

[fol. 52] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC., Plaintiff,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, Intervenors.

Before: L. Hand, Circuit Judge, and Caffey and Hulbert, District Judges.

Upon final hearing before a court, convened under Sec. 47 of Title 28, U. S. Code, of an action brought under Sec. 41 (28), Title 28, U. S. Code, to set aside an order of the Interstate Commerce Commission.

George H. Rosen, for the plaintiff.

Robert L. Pierce, for the United States.

E. M. Reidy, for the Interstate Commerce Commission.

James F. X. O'Brien, for Hudson Transit Lines, Inc., Intervening.

Henry P. Goldstein, for Mountain Transit Corp., Intervening.

OPINION

L. HAND, C. J.:

This cause comes on before a court, convened under Sec. 47 of Title 28, U. S. Code, for final hearing of an action brought under Sec. 41(28) of Title 28, U. S. Code, to set aside an order of the Interstate Commerce Commission, and thus to reinstate its earlier order which the order appealed from modified. The plaintiff is a common carrier by motor, a corporation which succeeded to a partnership from which we need not distinguish it. On June 1, 1935, [fol. 53] it was operating a fleet of six sedan motor cars, each capable of seating seven persons—six passengers and the driver—between New York City, (chiefly from the Borough of Bronx), and points in Ulster and Sullivan Counties, over a route, part of which was in New Jersey. On February 12, 1936, it filed an application with the Commission under Sec. 306(a) of Title 49, U. S. Code, (the "Grandfather Clause" of the Motor Carrier Act of 1935), for a certificate authorizing it to continue this service, which on March 26, 1937, it supplemented by a more formal application, accompanied by supporting affidavits. A protest against the grant of such a certificate having been made, the case came on for hearing on November 30, 1937, at the New York district office of the Commission and proofs were taken. On May 7, 1938 the Commission entered an order, which it modified in unessential details by a second order entered on June 20, 1938, which is the order that the plaintiff wishes reinstated. This order awarded a certificate to the plaintiff which described the service to be rendered as being "over the regular route, between fixed termini, and to and from intermediate and off-route points" for four summer months "between New York, N. Y. and Woodbourne, N. Y." After specifying the route in detail the certificate concluded: "Intermediate and off-route points within 20 miles of Woodbourne." Protests against this order were at once filed by a number of bus lines and the matter was referred back to the division for further investigation. Notice of a further hearing for December 1, 1938, was given, at which however no new evidence was taken, and which the plaintiff apparently did not attend. The Commission, having before it many applications in-

volving the "Grandfather Clause", and being divided as to its meaning, withheld decision until September 2, 1941, when it superseded its certificate of June 20, 1938, and [fol. 54] granted another in the following terms:

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:
>
> "Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenberg, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

The plaintiff, which had been satisfied with the first certificate, objected to the second, and, after two petitions for rehearing had been denied, (one addressed to the division which had issued the certificate, and the other to the whole Commission), brought this action on September 30, 1942. The amended complaint alleged that the second certificate was unlawful, because it should not have limited the plaintiff in five particulars: 1.) to vehicles carrying only six passengers and the driver; 2.) to "door-to-door service"; 3.) to "irregular routes"; 4.) to "non-scheduled" service; 5.) to "special operations." In addition the complaint challenged the power of the Commission to modify the certificate of June 20, 1938, without taking further evidence, and holding another hearing. Answers having been filed, the cause came on for hearing upon the pleadings and the record of the proceedings before the Commission.

The case turns upon three sections of the Motor Carriers Act, (Secs. 306, 307 and 308 of Title 39, U. S. Code), which subject "common carriers"—as distinct from "contract carriers", (Sec. 309)—generally to the control and regulation of the Commission by requiring them to obtain certifi-

[fol. 55] cates of "public convenience and necessity", similar to those required of common carriers by rail for extensions of their lines, (Sec. 1(18), Title 49, U. S. Code). The proviso to Sec. 308(a), upon which the plaintiff must rely for the scope which it claims for its certificate, applies to all certificates granted to "common carriers" under Sec. 307(a), whether under the "Grandfather Clause", or otherwise; and it will be clearer to consider the Commission's powers as a whole before taking up that clause itself. After giving general superintendence over the subject-matter to the Commission by Sec. 306(a), Congress in Sec. 307(a) directed it to issue certificates, when these are "required by the present or future public convenience and necessity." The section concludes with a proviso which limits such certificates, in the case of passenger carriers, to " ular * * * routes, and between fixed termini, exc as such carriers may be authorized to engage in special or charter operations." Section 308(a) defines what shall be the contents of such certificates: they must "specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in the case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." (We interpret special * * * operations" in the proviso to Sec. 307(a), as meaning the same thing as "operations not over specified routes," just quoted from Sec. 308(a): i. e. operations within a defined territory not upon regular routes, or between fixed termini). Finally, Section 308(a) makes "the exercise of the privileges granted" by a certificate subject, both at its issue and at any later time, to "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require."

[fol. 56] Thus it appears, not only because the certificate is to "specify the service to be rendered" as well as the routes over which it shall be rendered, but also because that service is to be always subject to regulation in the interests of the public, that Sec. 308(a)—unless because of its proviso—, leaves complete regulatory power in the Commission's hands. That proviso does, however, set a limit upon its power, and the result at bar depends upon what that is. It declares that none of the "terms, conditions, or

limitations shall restrict the right of the carrier to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require." The parties at bar appear to assume that this is more than merely a direction for the guidance of the Commission; and that, ex proprio vigore, it gives the carrier the privilege without recourse to the Commission of adding to his service as he may find it desirable to do so. That is indeed probably its true meaning; in any event we shall assume so for the purpose of this case, for in any event it must be read quantitatively. As we have already observed, the Commission must not only prescribe the route over which the carrier shall operate, but it must also "specify the service to be rendered." No one suggests that the proviso to Sec. 308(a) authorizes the carrier to change the prescribed route, and there is as little reason for saying that it justifies a change in the service to be rendered. Unless that feature of the certificate is to become a dead letter, and the Commission is to be stripped of all power except to fix routes, the carrier cannot have power substantially to modify the quality of his service, however free he may be to "add" to it in amount; and certainly nothing can more directly touch the quality of transportation than the cars in which passengers are carried. Indeed, limitation as to the quality of the service was inevitable in the public interest: a line of light small passenger cars—like [fol. 57] those here at bar—may be desirable however numerous, over routes upon which a fleet of powerful, heavy, commodious, motor busses, capable of seating forty or fifty passengers, and weighing perhaps ten tons, would be wholly unsuitable.

The proviso in Sec. 306(a)—the "Grandfather Clause"—was apparently inserted to avoid the hardship which would result from forcing a carrier to justify his existing business in terms of public convenience. It was meant to accept the motor vehicle system as it was; it recognized as vested such rights as had grown up before Congress asserted any public interest in motor transportation; and consistently, the rights protected should be measured by past user. Strictly, it was therefore an anomaly to give carriers who secured certificates under the "Grandfather Clause", the privilege of indefinite quantative expansion. The only reason for dispensing with the Commission's supervision—i. e. the injustice involved in stopping a business which had

grown up in reliance upon the failure of Congress to act—ceased with the protection of the business as it stood when regulation began; and possibly Congress did not realize that it was going as far as it did. Be that as it may, if the holders of such certificates have the same unlimited power to change the quality of their service as they had to add to its quantity, Congress, in an effort to prevent the unduly harsh impact of a new system, created a favored group of carriers, substantially free from all regulation over those routes on which they may have chanced to operate on June 1, 1935. So far at least, it is safe to say that Congress did not mean to go.

It follows from what we have just said that all those limitations of which the plaintiff complains were properly imposed upon its certificate, for all served to "specify the service to be rendered". There can be no debate about the first, which confines the service to cars holding only seven [fol. 58] persons. The second, describing the business as a "door-to-door service", is not to be understood as preventing the plaintiff from picking up passengers either at No. 531 East 169th Street in the Bronx—said to be its New York "office"—or at any fixed place in the village of Woodbourne or elsewhere; and when so understood, the description is accurate, for it does do a "door-to-door" business. The Commission is certainly not limited to the exact words of the statute; it could not properly "specify" the service at all, if it were. Third: it was also proper to describe the route as "irregular". A "regular" route means one which has only "fixed termini", not one which always traverses the same roads for part of its route. The fact that the plaintiff picks up and sets down its passengers at places of their own choosing make its whole route "irregular". Its professed fear that its privilege of passing over the same roads between the Bronx and Wurtsboro may be forfeited is altogether fanciful. Fourth: the service was properly described as "non-scheduled", for such it is; if the plaintiff wishes to run on a schedule, it must apply to the Commission for a change. Fifth: the operation was "special" for that word—borrowed from the proviso in Sec. 307(a)—is used, as we have already indicated, in contrast with a "regular" route "between fixed termini".

Finally, we can see nothing improper in the procedure adopted by the Commission in changing its decision: it acted upon the same record and after notice to the plaintiff

of a new hearing. True, the interval between the orders were long; but the whole subject was new and confused, and the Commission itself was divided in opinion. The plaintiff was deprived of no right, substantial or procedural, and indeed does not even now allege that any other evidence would have changed the result.

[fols. 59-63] The amended complaint will therefore be dismissed; findings and a judgment are filed herewith.

Complaint dismissed.

[fol. 64] In United States District Court

[Title omitted]

Order Allowing Appeal from the District Court to the Supreme Court—Filed April 16, 1943

The Petition of Crescent Express Lines, Inc., the above named plaintiff for an appeal from the Decree and Judgment dated February 27, 1943 and entered in the above entitled action on the 6th day of March, 1943, to the Supreme Court of the United States is hereby granted, and the appeal is hereby allowed upon the petitioner giving bond for costs as required by law in the sum of Two Hundred and Fifty ($250.00) dollars.

Dated: April 16th, 1943.

Hulbert, United States District Judge.

[fol. 65] In United States District Court

[Title omitted]

Petition for Appeal

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Crescent Express Lines, Inc., feeling itself aggrieved by the Decree and Judgment dated February 27, 1943 and entered by this Court on March 6, 1943 prays an appeal from said Decree and Judgment to the Supreme Court of the United States in accordance with the statutory requirements.

The particulars wherein plaintiff considers the decree erroneous are stated in the Assignment of Errors,

which accompanies this petition and to which reference is hereby made. Said plaintiff prays that a transcript of the record, proceedings and papers upon which said judgment was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

Dated: April 16, 1943.

George H. Rosen, Attorney for Plaintiff, Office & P. O. Address, 302 Broadway, Borough of Manhattan, New York City.

[fol. 66] In United States District Court

[Title omitted]

Assignment of Errors

The above named plaintiff files with the Clerk of the above entitled District Court with its petition for appeal in the above entitled action, the following assignment of errors upon which it will rely upon the prosecution of the appeal petitioned for in said action as set forth in its petition for appeal:

1. The Court erred in making Finding of Fact numbered "6" insofar as it states that the Commission gave notice to the plaintiff of a new hearing in the absence of evidence of what said new alleged hearing consisted of and in the absence of any evidence being given in opposition to the order of June 20, 1938.

2. The Court erred in making Finding of Fact numbered "7" that the certificate issued on September 2, 1941 truthfully "specifies" the service rendered by the plaintiff and its predecessors as of June 1, 1935.

3. The Court erred in making Finding of Fact numbered "8" in finding that the certificate restricts the plaintiff to the use of cars capable of carrying not more than six passengers not including the driver and children under 10 [fols. 67-68] years of age who do not occupy a seat or seats.

4. The Court erred in making Conclusion of Law numbered "1" that the order of September 2, 1941 was adequately supported by evidence.

5. The Court erred in making Conclusion of Law numbered "2" that the Commission lawfully restricted the

equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935.

6. The Court erred in making Conclusion of Law numbered "3" that the restrictions in the certificate upon the plaintiff's services to non-scheduled operations, the authorized route as "special and irregular" and the service as "door-to-door," were lawful.

7. The Court erred in making Conclusion of Law numbered "4" in dismissing the amended complaint upon the merits with costs.

8. The Court erred in making the Decree and Judgment herein in that the same is contrary to law, contrary to the evidence and contrary to the Findings of Fact and Conclusions of Law.

Wherefore, plaintiff prays that the Decree and Judgment of the said District Court be reversed and that the order of the Interstate Commerce Commission dated September 2, 1941 be vacated and set aside and the order of the Interstate Commerce Commision dated June 20, 1938 be reinstated and for such other, further and different relief as may be just and proper in the premises.

George H. Rosen, Attorney for Plaintiff, Office & P. O. Address, 302 Broadway, Borough of Manhattan, New York City.

[fol. 69] In United States District Court

[Title omitted]

Notice of Appeal

To the United States of America and the Interstate Commerce Commission, Defendants, and Hudson Transit Lines, Inc., and Mountain Transit Corporation, Intervenors:

Please Take Notice, that, pursuant to the statutes and rules of court in such case made and provided, Crescent Express Lines, Inc., does hereby appeal to the Supreme Court of the United States from the Decree and Judgment of the District Court of the United States for the Southern District of New York made on the 27th day of February, 1943 and filed on the 6th day of March, 1943 in the office of the Clerk of said Court, which dismissed the amended complaint of said plaintiff, and does hereby ap-

peal from each and every part of said Decree and Judgment as well as from the whole thereof.

Attached hereto is a copy of the Petition for Appeal, the order allowing the appeal, the assignment of errors, and the Statement as to Jurisdiction. Your attention is further directed to the provisions of Rule 12 of the Rules of the [fol. 70] Supreme Court of the United States, paragraphs 2 and 3 as follows:

> "2. If the appeal is allowed, the appellant shall serve the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorporated by him in the transcript of record prepared for this court upon the appeal.
>
> "3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court, asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made it may be opposed as provided in Rule 7, paragraph 3."

Dated: N. Y., April 16, 1943.

Yours, etc., George H. Rosen, Attorney for Plaintiff, Office & P. O. Address, 302 Broadway, Borough of Manhattan, New York City.

[fol. 71] In United States District Court

[Title omitted]

Notice to the Attorney General of the State of New York

To the Honorable Nathaniel L. Goldstein, Attorney General of the State of New York:

Pursuant to Section 210 of the Judicial Code, 38 Stat. 220, U. S. C. A., Title 28, Section 47 (a) you are hereby

notified that plaintiff in the above entitled cause has taken an appeal to the Supreme Court of the United States from the final decree of the District Court of the United States for the Southern District of New York, dated February 27, 1943 and filed in the office of the Clerk of said Court on March 6, 1943, and the order allowing the appeal makes the same returnable within forty days from the date thereof.

Dated: April 16th, 1943.

George H. Rosen, Attorney for Plaintiff, Office & P. O. Address, 302 Broadway, Borough of Manhattan, New York City.

[Stamp:] Copy of within paper received April 21, 1943. Department of Law, New York City Office, Nathaniel L. Goldstein, Attorney General.

[fol. 72] In United States District Court

[Title omitted]

Affidavit of Service

State of New York,
County of New York, ss.:

George H. Rosen, being duly sworn, deposes and says:

That on the 21st day of April, 1943 he served the following papers in the within matter on Nathaniel L. Goldstein, Attorney General of the State of New York, by leaving copies of said papers personally with Alfred W. Jones, Assistant Attorney General, to wit: Notice of Appeal, Petition and Order Allowing Appeal, Assignment of Errors, Statement as to Jurisdiction, Citation on Appeal, Bond for Costs; said service was made at the office of said Attorney General at 80 Centre Street, Borough of Manhattan, City, County and State of New York.

That on the 21st day of April, 1943, deponent did serve a copy of the praecipe dated April 21, 1943 to said Nathaniel L. Goldstein, Attorney General of the State of New York by mailing the same in a postpaid sealed wrapper addressed to said Nathaniel L. Goldstein, Attorney General

of the State of New York at 80 Centre Street, New York City, and depositing the same in a post office box regularly maintained by the Government of the United States at 302 Broadway, Borough of Manhattan, City and State of New [fols. 73-74] York.

George H. Rosen.

Sworn to before me this 21st day of April, 1943.
George Winter, Notary Public.

[fol. 75] In United States District Court

[Title omitted]

Affidavit of Service

State of New York,
County of New York, ss.:

Beatrice Martin, being duly sworn, deposes and says:

That she is employed in the office of George H. Rosen attorney for the plaintiff.

That on the 21st day of April, 1943, she served the following papers through the Post Office, by depositing a true and correct copy of each of said papers to wit: Notice of Appeal, Petition and Order Allowing Appeal, Bond, Assignment of Errors, Statement as to Jurisdiction, Citation and Praecipe, properly enclosed in postpaid wrappers, in the Post Office regularly maintained by the Government of the United States, at Church and Vesey Streets in the Borough of Manhattan, City of New York upon the following attorneys at their addresses indicated, which said addresses were designated by them for that purpose upon the preceding papers in this action. That deponent is over the age of 18 years and not a party to this action.

Edward M. Reidy, Esq., c/o Interstate Commerce Commission, Washington, D. C.

Robert L. Pierce, Esq., Department of Justice, Washington, D. C.

Henry P. Goldstein, Esq., 1450 Broadway, New York City.

[fol. 76] James F. X. O'Brien, Esq., 17 Academy Street, Newark, New Jersey.

Beatrice Martin.

Sworn to before me this 21st day of April, 1943.
George Winter, Notary Public.

[fols. 77-79] [Citation in usual form omitted in printing]

[fols. 80-84] [Clerk's Certificate to foregoing transcript omitted in printing.]

Form B.M.C. A.

3

ALTERNATE FORM

PROPERTY AND PASSENGER CARRIER APPLICATION

(Under "Grandfather" Clause)

(This form may be used only by Common Carriers engaged in transportation of property or passengers in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter, and may be used in lieu of either B.M.C. 1 or 2, and must be filed on or before February 12, 1936.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of JACOB VANDERCOSKY (Full name)
for appropriate authority to continue to operate as a motor carrier under the Motor Carrier Act, 1935.

DOCKET NO. MC-78980 (Do not fill in)

APPLICATION

INTERSTATE COMMERCE COMMISSION
DEC 17 1936

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

Applicant's name is JACOB VANDERCOSKY

Business address 531 East 169th Street (Street and number), New York City (City)
Bronx (County), New York (State)

Applicant is a Partnership (Individual, partnership or corporation) doing business under the trade name or style of

CRESCENT MOUNTAIN SERVICE

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

DOCKET MC-FC 14102
Substitution for or in

New York City to Monticello, Liberty, Mountaindale, Fallsburg, Woodridge, Woodbourne, Wurtsboro, Bloomingburgh, Middletown
(Describe briefly the route, routes, or territory served)

Granted 10-31-46
(Granted or Denied) (Date)

APPLICATION

INTERSTATE COMMERCE COMMISSION
DEC 12 1936

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

Applicant's name is JACOB VANGROSKY

Business address 531 East 169th Street, (Street and number) New York City (City)

Bronx (County) New York (State)

Applicant is a Partnership (Individual, partnership or corporation) doing business under the trade name or style of

CRESCENT MOUNTAIN SERVICE

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

DOCKET MC-FC 14102
Suspension or in

New York City to Monticello, Liberty, Mountaindale, Fallsburg, (Describe briefly the route, routes, or territory served)
Woodridge, Woodbourne, Hurtsboro, Bloomingburgh, Middletown

Granted 12-31-36
(Denied) (Date)

In filing this application, Applicant agrees to furnish all of the facts, statements, data, and evidence which are required in Form B.M.C. 1 or 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

Applicant has complied with the orders of the Commission relative to the service of application on interested parties; and will submit such additional information to substantiate Applicant's prayer herein as the Commission may require.

Applicant reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver thereof.

WHEREFORE, Applicant hereby applies to the Interstate Commerce Commission for appropriate authority to continue to operate as a motor carrier, pursuant to Section 206(a) or Section 209(a) of the Motor Carrier Act, 1935.

Dated this 11th day of February, 1936.

CRESCENT MOUNTAIN SERVICE
(Applicant)

By Jacob Vangrosky (Title) one of registered owners

(OVER)

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MATERIAL UNSUITABLE FOR MICRO-CARDING

Form B.M.C. A.

OATH

State of New York)
) ss:
County of New York)

JACOB MANGROFSKY (Name of affiant) makes oath and says that he is the one of registered owners and partner (Title of affiant)

of the Crescent Mountain Service (Name of Applicant); that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application; that he has carefully examined all of the statements contained in such application; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Jacob Mangrofsky.

Subscribed and sworn to before me, a notary public in and for the State and County above named,

this 11th day of February, 1936.

(SEAL)

Michael E. Gail

My commission expires

GENERAL INSTRUCTIONS

This is an emergency form which MAY be used as an alternate form in lieu of either Forms B.M.C. 1 or 2, by those claiming rights under the "Grandfather" clause of the Motor Carrier Act, 1935, as Common Carriers of property or passengers on June 1, 1935, or Contract Carriers on July 1, 1935, and continuously thereafter in interstate or foreign commerce. All those who use this form will be required subsequently to support the allegations of the application by furnishing all of the facts, statements, data, and other evidence required in Forms B.M.C. 1 and 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

"Certificates of public convenience and necessity" will be issued to Common Carriers, and "Permits" to Contract Carriers.

JACOB MANGROFSKY (Name of affiant) makes oath and says that he is the one of registered owners and partner (Title of affiant)

of the Crescent Mountain Service (Name of Applicant); that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application; that he has carefully examined all of the statements contained in such application; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Jacob Mangrofsky

Subscribed and sworn to before me, a notary public in and for the State and County above named, this 11th day of February, 1936.

(SEAL)

Michael E Smith

My commission expires [illegible]

GENERAL INSTRUCTIONS

This is an emergency form which MAY be used as an alternate form in lieu of either Forms B.M.C. 1 or 2, by those claiming rights under the "Grandfather" clause of the Motor Carrier Act, 1935, as Common Carriers of property or passengers on June 1, 1935, or Contract Carriers on July 1, 1935, and continuously thereafter in interstate or foreign commerce. All those who use this form will be required subsequently to support the allegations of the application by furnishing all of the facts, statements, data, and other evidence required in Forms B.M.C. 1 and 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

"Certificates of public convenience and necessity" will be issued to Common Carriers, and "Permits" to Contract Carriers.

Applications on this form or on B.M.C. 1 or 2 must be filed on or before February 12, 1936. The Interstate Commerce Commission does not have authority under the Motor Carrier Act, 1935, to further extend the time for filing beyond said date. Loss of rights under the "Grandfather" clause will result from a failure to file applications therefor within the time above specified. If an operator is in doubt as to whether the service he renders comes within any of the exemptions provided in the Act, he should file an application. The filing of such application will not be deemed a waiver of any right to claim exemption from any and all provisions of the Motor Carrier Act, 1935.

Applications should be typed, and one copy kept in Applicant's files. The original of this application, properly signed and sworn to before a notary public, and one additional copy must be returned to:

THE INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON, D.C.

and one true copy must be filed with the Board, or Governor if there is no Board, of each State within which operations covered by this application are conducted.

Form B. M. C.—A-2

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STATEMENT OF FACTS IN SUPPORT OF PASSENGER-CARRIER APPLICATION

(This form for use ONLY by common carriers engaged in transportation of passengers in interstate or foreign commerce on June 1, 1935, and by contract carriers so engaged on July 1, 1935, and continuously thereafter who have heretofore filed, on Form B. M. C.—A, an application for a certificate or permit under "Grandfather" clauses.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Evidence, facts, statements and data of CRESCENT MOUNTAIN SERVICE
(Full and correct name)

In support of application filed on or before February 12, 1936, on Form B. M. C.—A for certificate (Certificate or permit) to operate as common carrier (Common carrier or contract carrier) of passengers, under the Motor Carrier Act, 1935.

78980

DOCKET No. ..... (Do not fill in)

STATEMENT

TO THE INTERSTATE COMMERCE COMMISSION, WASHINGTON, D. C.

Applicant states, that on or before February 12, 1936, applicant filed with the Interstate Commerce Commission on Form B. M. C.—A an application for a certificate (Certificate or permit) to operate as a common carrier (Common carrier or contract carrier) and in support of the facts set forth therein, APPLICANT SUBMITS THE FOLLOWING:

MC 14010

Granted 10-31-40

That full and correct name of applicant is CRESCENT MOUNTAIN SERVICE (This)

Business address 531 East 169th Street (Street and number) Bronx (City)
Bronx (County) New York (State)

That applicant is a firm (1), doing business under the trade name or style of Crescent Mountain Service

That applicant, if a corporation, was organized under the laws of the State of ..... ; and that, if a partnership, the names and addresses of the partners are as follows:

Name	*State, city, and street address*
Harman Trevax	1095 Bristow St., Bronx, N.Y.
Jacob Vangrofsky	1111 Intervale Ave., Bronx, N.Y.
Murray Galley	1251 Webster Ave., Bronx, N.Y.
Morris Glickman	2029 La Fontaine Ave., Bronx, N.Y.

If an association, describe clearly its character .....

That a more particular description of the route, routes or territory served by the applicant (or predecessor in interest) which applicant briefly described in the application heretofore filed on B. M. C.—A, and of the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on June (2) 1, 1935, is set forth in Exhibit A, attached hereto, and made a part hereof.

That no change has occurred in the type of service furnished and the operations conducted since June (2) 1, 1935, except as shown in Exhibit A.

That evidence of the operations of applicant, described in Exhibit A hereof, is contained in Exhibit B.

That applicant will furnish such additional information to substantiate the applicant's prayer, in the application heretofore filed, as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of this statement on interested parties, as shown in Exhibit C.

WHEREFORE applicant prays that the evidence, facts, statements, and data contained herein and in the exhibits attached hereto, be considered by the Commission in support of said application heretofore filed.

Dated this 23d day of March, 1937

CRESCENT MOUNTAIN SERVICE
(Applicant)

By Morris Glickman member of firm
(Title)

STATEMENT

D.N. [illegible] MC 14106

To the Interstate Commerce Commission, Washington, D. C.

Applicant states, that on or before February 12, 1936, applicant filed with the Interstate Commerce Commission on Form B. M. C.—A an application for a certificate (Certificate or permit) to operate as a common carrier (Common carrier or contract carrier) and in support of the facts set forth therein, APPLICANT SUBMITS THE FOLLOWING:

Granted 10-31-40

That full and correct name of applicant is CRESCENT MOUNTAIN SERVICE

Business address 531 East 169th Street (Street and number) Bronx (City) Bronx (County) New York (State)

That applicant is a firm (1), doing business under the trade name or style of Crescent Mountain Service

That applicant, if a corporation, was organized under the laws of the State of ; and that, if a partnership, the names and addresses of the partners are as follows:

Name	*State, city, and street address*
Herman Trevax	1595 Bristow St., Bronx, N.Y.
Jacob Vangrofsky	1111 Intervale Ave., Bronx, N.Y.
Murray Galley	1251 Webster Ave., Bronx, N.Y.
Morris Glickman	2029 La Fontaine Ave., Bronx, N.Y.

If an association, describe clearly its character

That a more particular description of the route, routes or territory served by the applicant (or predecessor in interest) which applicant briefly described in the application heretofore filed on B. M. C.—A, and of the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on June (2) 1, 1935, is set forth in Exhibit A, attached hereto, and made a part hereof.

That no change has occurred in the type of service furnished and the operations conducted since June (2) 1, 1935, except as shown in Exhibit A.

That evidence of the operations of applicant, described in Exhibit A hereof, is contained in Exhibit B.

That applicant will furnish such additional information to substantiate the applicant's prayer, in the application heretofore filed, as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of this statement on interested parties, as shown in Exhibit C.

Wherefore applicant prays that the evidence, facts, statements, and data contained herein and in the exhibits attached hereto, be considered by the Commission in support of said application heretofore filed.

Dated this 23rd day of March, 1937

CRESCENT MOUNTAIN SERVICE (Applicant)

By Morris Glickman member of firm (Title)

OATH

INTERSTATE COMMERCE COMMISSION RECEIVED MAR 26 1937 SECTION OF CERTIFICATES & INS.

State of New York

County of ~~Bronx~~ New York } ss.

Morris Glickman (Name of affiant) makes oath and says that he is ~~xxx~~ member of firm (Title of affiant) of the Crescent Mountain Service (Name of applicant); that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this statement and exhibits attached thereto; that he has carefully examined all the statements contained therein, and the exhibits attached thereto, and made a part thereof; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Morris Glickman

Subscribed and sworn to before me, a Notary Public in and for the State and county above named, this 23rd day of March, 1937

[SEAL]

Milton Cotton

My commission expires Milton Cotton

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U. S. GOVERNMENT PRINTING OFFICE 16—1488

73080

SUPPLEMENTAL PASSENGER CARRIER APPLICATION

CRESCENT MOUNTAIN SERVICE

Applicant reserves the right to make application for any and all additional regular and irregular routes not herein contained to which it is entitled pursuant to Section 206 and/or Section 209 of the Motor Carrier Act, 1935; and applicant further reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver of any of the applicant's rights.

INTERSTATE COMMERCE COMMISSION
RECEIVED
MAR 26 1937
SECTION OF CERTIFICATES & INS.

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B. Applicant (or predecessor) undertook to transport for the general public for hire ...Yes... (Yes or No) If answer is "No", state for whom applicant (or predecessor) transported under special contracts or agreements:

Name	City and street address	Written or verbal

C. Applicant has continued to operate as above stated without any change in the ty[illegible] and is now so operating ...Yes... (Yes or No) If answer is "No", state in detail character and extent of such change:

INTERSTATE COMMERCE COMMISSION
RECEIVED
MAR 26 1937
SECTION OF CERTIFICATES & INFO.

D. If service was not rendered on or has been interrupted since statutory date, give facts and reasons clearly and in detail

...no interruptions...

II. Description of each route regularly operated on ...June... (3) 1, 1935:

A. By applicant (or predecessor in interest) in own right:

1. Between ...See Supplemental Exhibit A-II-A... (Indicate furthermost points on route), as follows:

(a) From ...New York City... (Indicate furthermost points under each highway number) to ...Fort Lee, N. J.... via Highway ...Geo. Wash. Br.... (Use U. S. highway number wherever applicable; otherwise State or county highway number)

(b) From ...Fort Lee, New Jersey... to ...Bergenfield, N.J.... via Highway ...N.J. #4...

(c) From ...Bergenfield, N.J.... to ...Suffern, New York... via Highway ...N.J. #2...

(d) From ...Suffern, New York... to ...Sullivan & Ulster Cos.... via Highway ...N.Y. #17...

(e) From ..... to ..... via Highway .....

(Repeat as above for each route and part thereof. See example in note 3 on last page. Indicate in each case whether return routes correspond to those above described. If not, furnish similar description for return route. Furnish map showing each route.)

Show also, for each route separately:

(1) Whether all intermediate points were served ..... (Yes or No); if not, indicate exceptions .....

...See Supplemental Exhibit A-II-A (1)...

(2) The off-route points served .....

...See Supplemental Exhibit A-II-A (2) (4)...

(3) Character of traffic (that is, in addition to passengers and baggage of passengers, whether express, mail, newspapers were transported in same vehicle with passengers) ...passengers and baggage of passengers only...

(4) Frequency of service (where interval between schedule was one day or more) .....

...Seasonal operations (see Sup. Exhibit A-II-G...

(5) Points at which traffic was interchanged, with whom interchanged, and the arrangement, if any, under which interchange was effected, including whether or not through tickets were sold .....

...no interchange of traffic...

12—1939

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EXHIBIT A—Continued

B. Has applicant acquired or instituted a route or routes since June (2) 1, 1935? no (Yes or no) If so, attach statement (designated as II-B), giving, for each such route, the information requested in A above and name and address of predecessor, if any. Attach copy of purchase agreement, State certificates or permits, or other documents evidencing acquisition or institution of each such route or routes.

C. Did applicant in application heretofore filed apply for rights over any route or routes operated by others under agreement? no (Yes or no) If so, attach statement (designated as II-C), giving, for each such route, the information requested in A above and name and address of operator. Attach copy of lease or operating agreement.

D. Does applicant operate over any route or routes under a lease or operating agreement? no (Yes or no) If so, attach statement (designated as II-D), giving, for each such route, the information requested in A above and name and address of the other party to such lease or agreement. Attach copy of such lease or agreement.

E. Has applicant abandoned or otherwise disposed of any route or routes since June (2) 1, 1935? no (Yes or no) If so, attach statement (designated as II-E), giving, for each such route, the information requested in A above, the manner and date of disposition, and name and address of successor, if any. Attach copy of sales agreement or other documents evidencing such disposal.

F. Were operations on any of the above routes or parts of routes begun since January 1, 1935? no (Yes or no) If so, give the date on which operations commenced .....

G. Were operations on any of the above routes or parts of routes seasonal? yes (Yes or no) If so, attach statement (designated as II-G), giving the facts clearly and in detail, showing applicant's customary operation, including months of normal operating season.

III. If applicant (or predecessor in interest) on June (2) 1, 1935, conducted special or charter operations, indicate the territory served and whether such operations have been conducted continuously since no special operations

IV. Description of *special or charter operations* on June (2) 1, 1935. (To be furnished by those applicants rendering ONLY special or charter service.) NONE

A. Indicate territory served by setting forth (1) points at which traffic originated, (2) points or territory served, (3) frequency of service to each such point or territory in the 6 months preceding (2) 1, 1935, and (4) whether baggage, express, mail, newspapers were transported in the same vehicles with passengers. See Sup Exhibit A-IV-A

B. Have there been any changes in the nature or extent of applicant's operations between June (2) 1, 1935, and date of this statement? no (Yes or no) If so, describe the changes in detail .....

D. Does applicant operate over any route or routes under a lease or operating agreement? no (Yes or no) If so, attach statement (designated as II-D), giving, for each such route, the information requested in A above and name and address of the other party to such lease or agreement. Attach copy of such lease or agreement.

E. Has applicant abandoned or otherwise disposed of any route or routes since June (3) 1, 1935? no (Yes or no) If so, attach statement (designated as II-E), giving, for each such route, the information requested in A above, the manner and date of disposition, and name and address of successor, if any. Attach copy of sales agreement or other documents evidencing such disposal.

F. Were operations on any of the above routes or parts of routes begun since January 1, 1935? no (Yes or no) If so, give the date on which operations commenced .....

G. Were operations on any of the above routes or parts of routes seasonal? yes (Yes or no) If so, attach statement (designated as II-G), giving the facts clearly and in detail, showing applicant's customary operation, including months of normal operating season.

III. If applicant (or predecessor in interest) on June (3) 1, 1935, conducted special or charter operations, indicate the territory served and whether such operations have been conducted continuously since no special operations

IV. Description of *special or charter operations* on June (3) 1, 1935. (To be furnished by those applicants rendering ONLY special or charter service.) NONE

A. Indicate territory served by setting forth (1) points at which traffic originated, (2) points or territory served, (3) frequency of service to each such point or territory in the 6 months preceding ..... (3) 1, 1935, and (4) whether baggage, express, mail, newspapers were transported in the same vehicles with passengers. See Sup Exhibit A-IV-A

B. Have there been any changes in the nature or extent of applicant's operations between June (3) 1, 1935, and date of this statement? no (Yes or no) If so, describe the changes in detail .....

.....

V. A. Number of vehicles in revenue service on June (3) 1, 1935:

Buses: 15 seats and under, 0; 16-21, 0; 22-29, 0; 30-33, 0; 34-40, 0; over 40, 0; sedans, 6 Total revenue vehicles owned by applicant 6 Total number leased to applicant 0 Total number leased by applicant to others 0

B. Number of vehicles in revenue service on date of this statement:

Buses: 15 seats and under, 0; 16-21, 0; 22-29, 0; 30-33, 0; 34-40, 0; over 40, 0; sedans 0 Total revenue vehicles owned by applicant 0 Total number leased to applicant 0 Total number leased by applicant to others 0

SUPPLEMENTAL EXHIBIT A

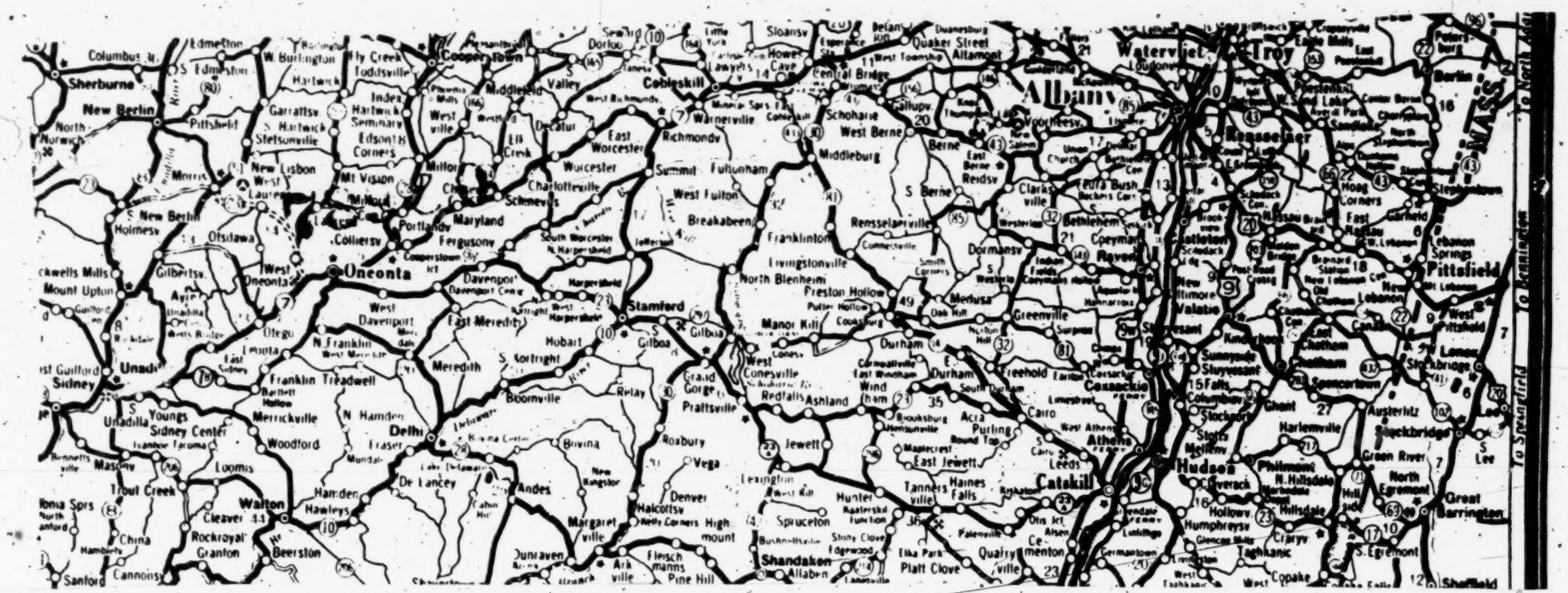
CRESCENT MOUNTAIN SERVICE
Applicant

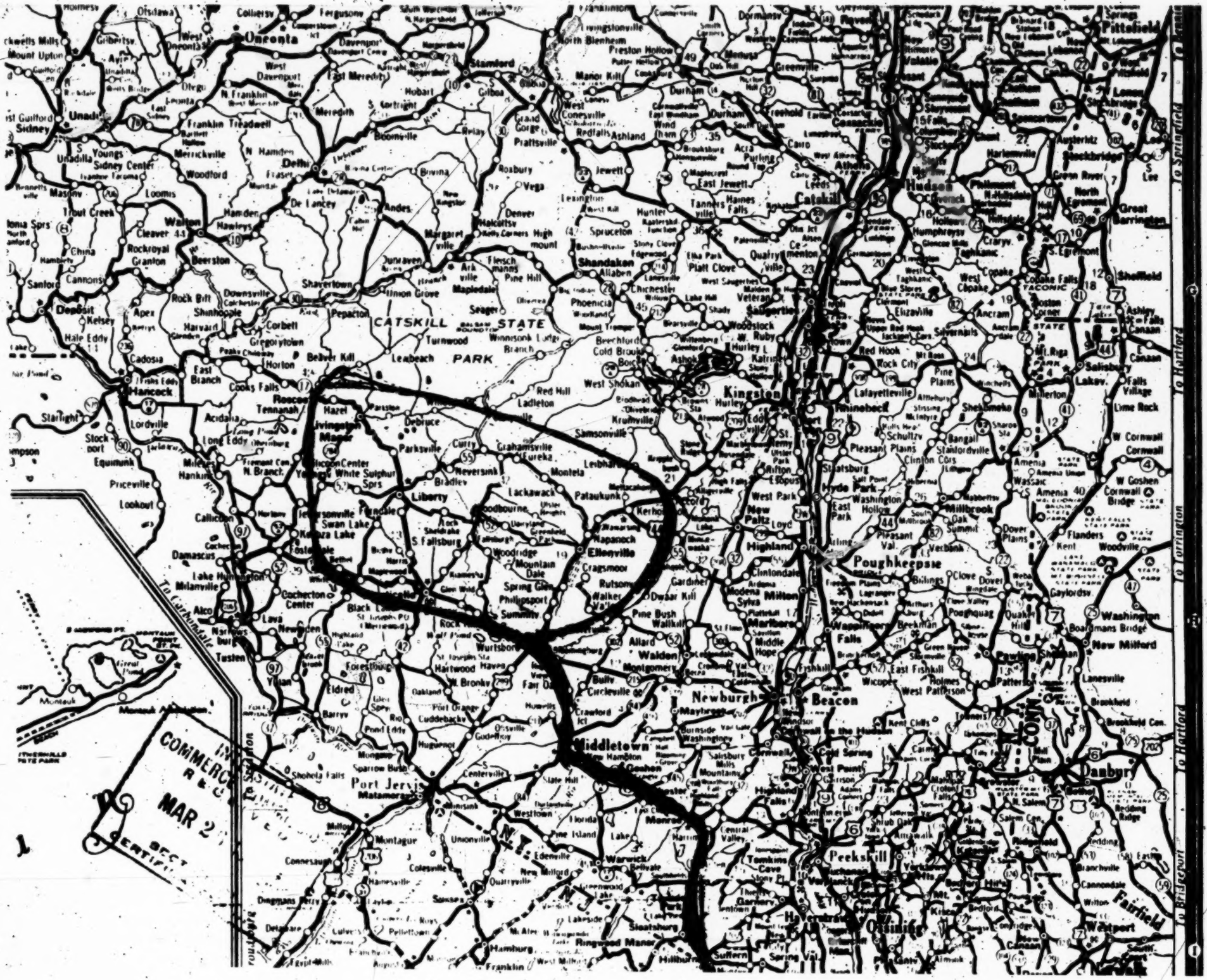
78980

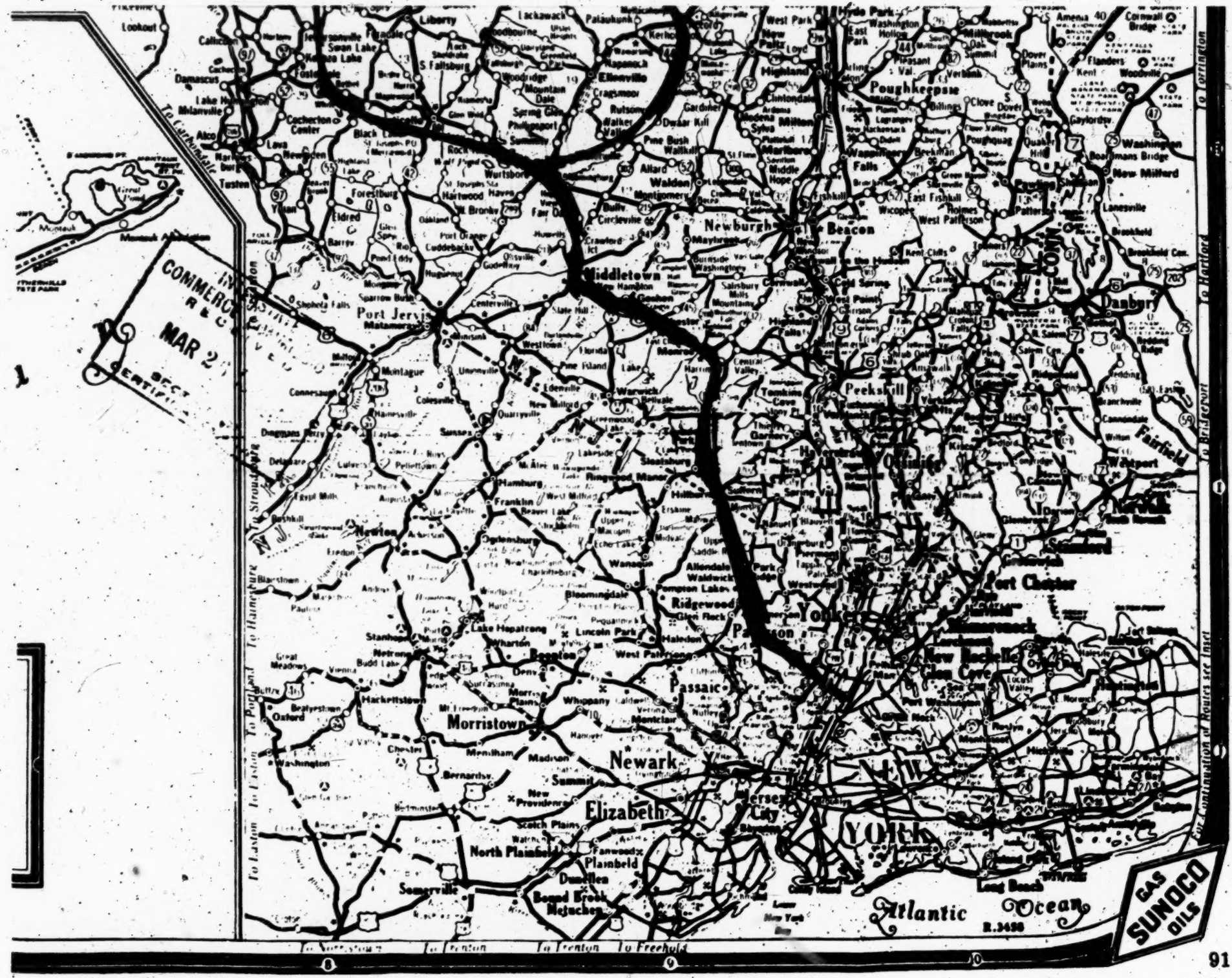
II-A Applicant transports passengers and baggage of passengers from the Borough of the Bronx, City of New York, to Sullivan and Ulster Counties, New York, and more particularly to Woodbourne, New York, in Sullivan County and within a radius of twenty (20) miles from the town of Woodbourne, New York

Applicant travels by way of George Washington Bridge to Fort Lee, New Jersey, thence northwest on New Jersey Route #4 to Bergenfield, New Jersey; thence north on New Jersey Route #2 to Suffern, New York; thence on New York Route #17 to Wurtsboro, New York, where traffic is distributed to the summer resorts within a radius of twenty (20) miles from Woodbourne, New York.

MAP SHOWING APPLICANT'S ROUTES:




CATSKILL STATE PARK
Oneonta
Stamford
Unadilla
Sidney
Delhi
Walton
Hancock
Roscoe
Livingston Manor
Liberty
Monticello
Kingston
Catskill
Hudson
Poughkeepsie
Newburgh
Beacon
Middletown
Port Jervis
Peekskill
Danbury
Pittsfield
Great Barrington
Salisbury
Canaan
Millerton
Amenia
Millbrook
Pine Plains
Rhinebeck
Red Hook
Tivoli
Saugerties
Woodstock
Phoenicia
Shandaken
Margaretville
Andes
Delhi
Sidney
Unadilla
Oneonta
Cooperstown
Richfield Springs
Cherry Valley
Sharon Springs
Schoharie
Middleburgh
Cobleskill
Schenectady
Albany
Troy
Hoosick Falls
Bennington
Manchester
Arlington
Rutland
Poultney
Granville
Whitehall
Glens Falls
Saratoga Springs
Ballston Spa
Amsterdam
Gloversville
Johnstown
Fonda
Canajoharie
Herkimer
Little Falls
Utica
Rome
Oneida
Syracuse
Auburn
Cortland
Binghamton
Owego
Waverly
Elmira
Corning
Hornell
Wellsville
Olean
Bradford
Kane
Warren
Jamestown
Dunkirk
Buffalo
Niagara Falls
Lockport
Batavia
Rochester
Geneseo
Mount Morris
Canandaigua
Geneva
Penn Yan
Watkins Glen
Hammondsport
Corning
Elmira
Ithaca
Seneca Falls
Waterloo
Auburn
Skaneateles
Cazenovia
Hamilton
Norwich
Oxford
Sherburne
Morrisville
Canastota
Oneida
Rome
Clinton
New Hartford
Utica
Herkimer
Mohawk
Ilion
Frankfort
Little Falls
Dolgeville
Fort Plain
St. Johnsville
Canajoharie
Palatine Bridge
Amsterdam
Johnstown
Gloversville
Fonda
Sharon Springs
Cherry Valley
Richfield Springs
Cooperstown
Milford
Otsego Lake
Schuylerville
Saratoga Springs
Ballston Spa
Glens Falls
Whitehall
Granville
Hoosick Falls
Bennington
Manchester
Arlington
Rutland
Poultney
Castleton
Fair Haven
Middlebury
Vergennes
Burlington
Plattsburgh
Malone
Ogdensburg
Massena
Potsdam
Canton
Gouverneur
Watertown
Sackets Harbor
Henderson
Oswego
Fulton
Pulaski
Sandy Creek
Mexico
Phoenix
Baldwinsville
Jordan
Elbridge
Skaneateles
Auburn
Seneca Falls
Waterloo
Geneva
Penn Yan
Watkins Glen
Hammondsport
Corning
Elmira
Ithaca
Cortland
Homer


Poughkeepsie
Newburgh
Middletown
Port Jervis
Peekskill
Danbury
Yonkers
Mount Vernon
New Rochelle
Port Chester
Stamford
Norwalk
Bridgeport
Fairfield
Passaic
Paterson
Hackensack
Morristown
Newark
Elizabeth
Jersey City
Plainfield
North Plainfield
Somerville
Dunellen
Bound Brook
Metuchen
Perth Amboy
Long Beach
Atlantic Ocean
To Hartford
To Bridgeport
To Stroudsburg
To Hamburg
To Portland
To Easton
To Trenton
To Freehold
GAS
SUNOCO
OILS

CRESCENT MOUNTAIN SERVICE
Applicant

78980

II-A-(1)

All intermediate points on the aforedescribed routes were not served. The applicant's main station in Sullivan County is located at Woodbourne, New York. The intermediate points served are located between Wurtsboro, New York, and Woodbourne, New York.

II-A-(2)

The off-routes points served are located within a radius of twenty (20) miles- north, east, south and west- of Woodbourne, New York, in Sullivan County.

II-G

All of the applicant's operations are seasonal operations. Applicant transports passengers and baggage of passengers from the County of Bronx, New York, to the summer resorts of New York located in the Counties of Sullivan and Ulster. These operations are commencedin the month of June and continue up to the month of October.

IV-A

Applicant obtains its traffic in the Boroughs of Manhattan and Bronx, in the City of New York, State of New York, and transports such traffic to the Counties of Sullivan and Ulster, in the State of New York. On return trips the applicant obtains its traffic in and about Woodbourne, New York, more specifically within a radius of twenty (20) miles from Woodbourne, New York, and transports such traffic to the five boroughs of New York City.

Trips are made ~~three and four times a week~~ daily during the months of June, July, August and September.

Baggage of passengers is transported in addition to passengers; there is no express, mail or newspapers transported.

CRESCENT MOUNTAIN SERVICE
Applicant

78980

II-A-(1)

All intermediate points on the aforedescribed routes were not served. The applicant's main station in Sullivan County is located at Woodbourne, New York. The intermediate points served are located between Wurtsboro, New York, and Woodbourne, New York.

II-A-(2)

The off-routes points served are located within a radius of twenty (20) miles- north, east, south and west- of Woodbourne, New York, in Sullivan County.

II-G

All of the applicant's operations are seasonal operations. Applicant transports passengers and baggage of passengers from the County of Bronx, New York, to the summer resorts of New York located in the Counties of Sullivan and Ulster. These operations are commencedin the month of June and continue up to the month of October.

IV-A

Applicant obtains its traffic in the Boroughs of Manhattan and Bronx, in the City of New York, State of New York, and transports such traffic to the Counties of Sullivan and Ulster, in the State of New York. On return trips the applicant obtains its traffic in and about Woodbourne, New York, more specifically within a radius of twenty (20) miles from Woodbourne, New York, and transports such traffic to the five boroughs of New York City.

Trips are made ~~three and four times a week~~ daily during the months of June, July, August and September. ✓

Baggage of passengers is transported in addition to passengers; there is no express, mail or newspapers transported.

Form B. M. C.—4-8

//

EXHIBIT B

CRESCENT MOUNTAIN SERVICE
(Name of applicant)

EVIDENCE OF OPERATION

1. Applicant as a common carrier on June 1, 1935, or a contract carrier on July 1, 1935, submits the following evidence as proof of his operations:

A. Certified copy of any order of any State authorizing applicant's or predecessor's operations and of any order authorizing transfer of such authority to applicant. (Attach and identify as statement B-I-A.)

B. That applicant or predecessor was registered under a code of fair competition as follows:

Registrant (If predecessor, give name)	*Name of code*	*Date or dates of registration*
		78680

INTERSTATE COMMERCE COMMISSION
RECEIVED
MAR 25 1937
SECTION OF CERTIFICATES & INS

C. Any other proof deemed necessary by applicant, such as affidavits, waybills, time schedules, etc. (Attach and identify as statement B-I-C.)

(Applicant submits a copy of a Certificate of Conducting Business as required by Section 440 of the Penal Law.)

EXHIBIT C

I, Milton Patton (Name of affiant), attorney for (Title of affiant) of the applicant, do hereby certify that upon the 24th day of March, 1937, I served the foregoing statement upon the boards, commissions, or officials (or the Governor where there is no board, commission, or official) of the States of New York and New Jersey in which States applicant operates, by delivering in person (or mailing by registered mail) a true, correct, and complete copy of this statement to each thereof at the following addresses:

B. That applicant or predecessor was registered under a code of fair competition as follows: 78080

Registrant (If predecessor, give name)	*Name of code*	*Date or dates of registration*

INTERSTATE COMMERCE COMMISSION
RECEIVED
MAR 25 1937
SECTION OF CERTIFICATES & INS

C. Any other proof deemed necessary by applicant, such as affidavits, waybills, time schedules, etc. (Attach and identify as statement B-I-C.)

(Applicant submits a copy of a Certificate of Conducting Business as required by Section 440 of the Penal Law.)

EXHIBIT C

I, Melton Cotton (Name of affiant), attorney for (Title of affiant) the applicant, do hereby certify that upon the 26th day of March, 1937, I served the foregoing statement upon the boards, commissions, or officials (or the Governor where there is no board, commission, or official) of the States of New York and New Jersey in which States applicant operates, by delivering in person (or mailing by registered mail) a true, correct, and complete copy of this statement to each thereof at the following addresses:

Public Service Commission (Name of board, etc.) Albany, New York (Address)

Board of Public Utility Commissioners- Trenton, New Jersey

Melton Cotton (Applicant)

19—1408

801—Certificate of Conducting Business under an Assumed Name. Penal Law Sec. 440.

JULIUS BLUMBERG, Inc., Law Blank Publishers 81 BROADWAY AND 1 RECTOR ST., NEW YORK

(Exhibit B-I-C)

12

State of New York,
County of Bronx } ss.:

We, The undersigned do hereby certify that we conduct or transact business in the said County under the name and style of

CRESCENT MOUNTAIN SERVICE

at 531 E. 169th Street, in the said County of Bronx and State of New York, and further certify that the true or real full name of the person conducting or transacting the said business, are as follows:

78980

Signature	Residence
Herman Trevaf	1395 Bristow St Bronx
Jacob Vangrofsky	1111 Intervale Av Bronx
Murray Gallay	1257 Wickles Av Bx
Morris Gluckman	2029 Lafontaine Ave

INTERSTATE COMMERCE COMMISSION RECEIVED MAR 26 1937 SECTION OF CERTIFICATES & INS.

Signature	Residence
Herman Trevas	1395 Bristow St Bronx
Jacob Vangrofsky	1111 Intervale Av Bronx
Murray Gallay	1257 Wickles Av Bx
Morris Gluckman	2029 Lafontaine Ave

STATE OF
COMMERCE COMMISSION
RECEIVED
MAR 26 1937
SECTION OF
CERT. FICATES & INS.

No. 13982

State of New York, } ss.:
County of Bronx, }

rsonally appeared

I, NICHOLAS J. EBERHARD, Clerk of the said County and Clerk of the Supreme Court of said State for said County, and Clerk of the County Court for said County, Do Certify, That I have compared the preceding with the original

ay Gallay

ted the foregoing

xecuted the same.

Harold Marcus

on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed Filed. Mar. 3, 1937

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 3rd day of Mar 1937

Nicholas J Eberhard Clerk.

94

3501—Certificate of Conducting Business under an Assumed Name Penal Law Sec. 440.

(Exhibit B-I-C)

12

State of New York, County of Bronx } ss.:

We The undersigned do hereby certify that we conduct or transact business in the said County under the name and style of

CRESCENT MOUNTAIN SERVICE

at 531 E. 167th Street, in the said County of Bronx and State of New York, and further certify that the true or real full name of the person(s) conducting or transacting the said business, are as follows:

78980

Signature	Residence
Herman Cherap	1375 Bristow St Bronx
Jacob Pungrofsky	1111 Intervale Av Bronx
M [illegible] Clay	1231 Wickles Av Bx
Morris Gluckman	2029 Lafontaine Ave

INTERSTATE COMMERCE COMMISSION RECEIVED MAR 23 1937 SECTION OF CERTIFICATES & INS.

Signature	Residence
Herman Tarver	1395 Bristow St Bronx
Jacob Weingrofsky	1111 Intervale Av Bronx
Harry Gilley	1251 Wickles Av Bx
Morris Glickman	2029 Lafontaine Ave

INTERSTATE COMMERCE COMMISSION
RECEIVED
MAR 26 1937
SECTION OF CERTIFICATES & INS.

New York, }
Bronx } ss.:

this 24th day of May, 1936, before me personally appeared Herman Tarver, Jacob Weingrofsky, Harry Gilley and Morris Glickman

known and known to me to be the individuals described in, and who executed the foregoing instrument, and they thereupon duly acknowledged to me that they executed the same.

U.S.

Richard E. Thiel

NOTARY PUBLIC
No. 7N15
No. 4N37
Commission expires March 30, 1937

95

Certificate

of

Herman Treat
Jacob Vengrofsky
Harry Sullam
Morris Cudman

CONDUCTING BUSINESS UNDER
THE NAME OF

CRESCENT MOUNTAIN
SERVICE

Pursuant to Sec. 440 Penal Law

69

Interstate Commerce Commission

BUREAU OF MOTOR CARRIERS

Jacob Vancrofsky
531 E. 169th St.,
New York City

Date: Dec 12 193 1

Dear Sir: M.C. # 78980

You are directed to appear at

Place: Room 724, 60 Hudson St.,
New York City (B)

Date: Dec 11, 1935

Time: 1 P.M.

with three completed copies of questionnaire for the purpose of furnishing data pertinent to the issuance of a certificate or permit to you under your "Grandfather" application to this Commission as provided in the Motor Carrier Act.

Your success or failure in securing a certificate or permit is directly dependent upon your cooperating with me at this time in furnishing the information requested.

Herewith are forms setting forth a series of questions which you are obliged to answer. There is also given you herewith a detailed statement of how you are to answer these questions.

It is your duty to proceed at once to answer this questionnaire as directed, so that when you meet with me at the time and place previously named in this letter your data may be ready for review.

You should understand that if any of the instructions herein are not clear, you may secure further information on these requirements upon application to this office.

Your failure to comply with these instructions may result in your being denied a certificate or permit, and will certainly lead to severe and unnecessary expense in protecting your rights in the future if neglected now.

[illegible]
551 E. 169th St.,
New York City

Date Dec 15 193[illegible]

Dear Sir: M.C. # 78980

You are directed to appear at

Place: Room 724, 60 Hudson St.,
New York City (B)

Date: Dec 11 1936

Time: 1 P.M.

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It is your duty to proceed at once to answer this questionnaire as directed, so that when you meet with me at the time and place previously named in this letter your data may be ready for review.

You should understand that if any of the instructions herein are not clear, you may secure further information on these requirements upon application to this office.

Your failure to comply with these instructions may result in your being denied a certificate or permit, and will certainly lead to severe and unnecessary expense in protecting your rights in the future if neglected now.

No expense is necessary if you follow the instructions given.

Yours very truly,

District Supervisor.

70

Interstate Commerce Commission

BUREAU OF MOTOR CARRIERS

Mr. Jacob Vancrofsky
531 E. 169 St.
New York City

Date: Jan. 18, 193

Dear Sir: M.C. # 78980

You are directed to appear at

Place: Room 724, 360 Hudson St.
New York City

Date: February 7th

Time: 10:00 am

with three completed copies of questionnaire for the purpose of furnishing data pertinent to the issuance of a certificate or permit to you under your "Grandfather" application to this Commission as provided in the Motor Carrier Act.

I sent you a notice to appear for examination and proof of operation covering the "Grandfather" rights for which you applied, and you failed to keep that appointment. I am setting another date for an appointment with you for this purpose, as provided above in this letter.

I wish to advise you that it is your duty to appear and furnish the information called for at the time and place specified, and must advise you that your failure to do so will result in my returning a report on your activity to our Bureau at Washington, to the effect that you are not interested in prosecuting your claim further and with my recommendation that your application be dismissed.

531 E. 169 St.
New York City

Dear Sir: M.C. # 78980

You are directed to appear at

Place: Room 724, #60 Hudson St.
New York City

Date: February 7th

Time: 10:00 am

with three completed copies of questionnaire for the purpose of furnishing data pertinent to the issuance of a certificate or permit to you under your "Grandfather" application to this Commission as provided in the Motor Carrier Act.

I sent you a notice to appear for examination and proof of operation covering the "Grandfather" rights for which you applied, and you failed to keep that appointment. I am setting another date for an appointment with you for this purpose, as provided above in this letter.

I wish to advise you that it is your duty to appear and furnish the information called for at the time and place specified, and must advise you that your failure to do so will result in my returning a report on your activity to our Bureau at Washington, to the effect that you are not interested in prosecuting your claim further and with my recommendation that your application be dismissed.

I wish to point out to you that if such action is taken by me, that it will then be necessary for you to handle any further activity in connection with your application in a formal manner with the Commission, which is liable to be expensive. I trust that if you do have any interest in your application, that you will not fail to appear at the time and place above specified.

Yours very truly,

(A. BAXTER)
District Supervisor.

98

Docket M.C. #78980

Q.1. What is the full and correct name of applicant?

A. JACOB VANGROFSKY, HERMAN TRAVAX, MORRIS GLICKMAN and MURRAY GALLEY, d.b.a. CRESCENT MOUNTAIN SERVICE

Q.2. What is the principal business address?

A. 531 East 169th Street, Borough of Bronx, City and State of N.Y.

Q.3. What is the legal identity of applicant?

A. Partnership.

Q.4. How many motor vehicle units do you operate?

A. Seven (7) Units

Q.5. Have you complied with the insurance requirements of this Commission? Give names of insurance companies, give policy numbers, give amounts of coverage, give effective date, give expiration date.

A. Public Liability Ins. Co. is _____

Policy No. _____ Coverage _____ Eff. Date _____ Exp. Date ___

Property Damage Ins. Co. is _____

Policy No. _____ Coverage _____ Eff. Date _____ Exp. Date ___

Cargo Insurance Company is _____

Policy No. _____ Coverage _____ Eff. Date _____ Exp. Date ___

Passenger Liability Ins. Co. is Red Cab Mutual Casualty Company

Policy No. T7852 Coverage $5,000-$15,000 Eff. Date Jan 14/38 Exp. Date Dec. 31/38

Q.6. Have you tariffs, or schedules of minimum rates on file with this Commission? List them.

A. M.P.I.C.C. #1 - - Docket # 78980

A. Partnership.

Q.4. How many motor vehicle units do you operate?

A. Seven (7) Units

Q.5. Have you complied with the insurance requirements of this Commission? Give names of insurance companies, give policy numbers, give amounts of coverage, give effective date, give expiration date.

A. Public Liability Ins. Co. is _____

Policy No. _____ Coverage _____ Eff. Date _____ Exp. Date ___

Property Damage Ins. Co. is _____

Policy No. _____ Coverage _____ Eff. Date _____ Exp. Date ___

Cargo Insurance Company is _____

Policy No. _____ Coverage _____ Eff. Date _____ Exp. Date ___

Passenger Liability Ins. Co. is Red Cab Mutual Casualty Company

Policy No. T7857 Coverage $5,m-$15,m Eff. Date Jan 14/38 Exp. Date Dec. 31/38

Q.6. Have you tariffs, or schedules of minimum rates on file with this Commission? List them.

A. M.P.I.C.C. #1 - - Docket # 78980

Q.7. What type of service were you rendering on June 1, or July 1, 1935, and since that date?

A. Applicant was in operation as a common carrier of passengers on June 1, 1935, prior thereto and since, in interstate transportation.

Q.8. What was the scope of the operation on June 1, or July 1, 1935?

A. See Supplemental Exhibit A

Q.9. What proof of operation as of June 1, or July 1, have you to submit in support of your claim of "Grandfather" rights?

A.

Q.10. Have there been any changes in operations or any interruptions in service?

A. No, except that applicant operates only from late May to late September in each year. Operations are seasonal only.

Q.10A. Have you made proper filing of your statutory agent in the States in which you operate, and with this Commission?

A. Yes

Q.11. State of New York)
County of New York) ss.

JACOB VANOROFSKY, affiant makes oath and says that he is partner of the applicant applicant for a certificate and/or permit, that he has personal knowledge of the statements made herein, and in supplementary statements attached hereto and made a part hereof, and that all matters herein are a true and cor-

[illegible] in support of your claim of "Grandfather" rights?

A. _____

Q.10. Have there been any changes in operations or any interruptions in service?

A. No, except that applicant operates only from late May to late September in each year. Operations are seasonal only.

Q.10A. Have you made proper filing of your statutory agent in the States in which you operate, and with this Commission?

A. Yes

Q.11. State of New York)
County of New York) ss.

JACOB VANOROFSKY, affiant makes oath and says that he is partner of the applicant applicant for a certificate and/or permit, that he has personal knowledge of the statements made herein, and in supplementary statements attached hereto and made a part hereof, and that all matters herein are a true and correct statement of fact to the best of his knowledge and belief.

Jacob Vanorofsky

Q.12. Subscribed and sworn to before me, a notary public _____ in and for the State and County above named, this 15th day of January, 1938 193 . My Commission expires March 30, 1939.

Milton Cotton

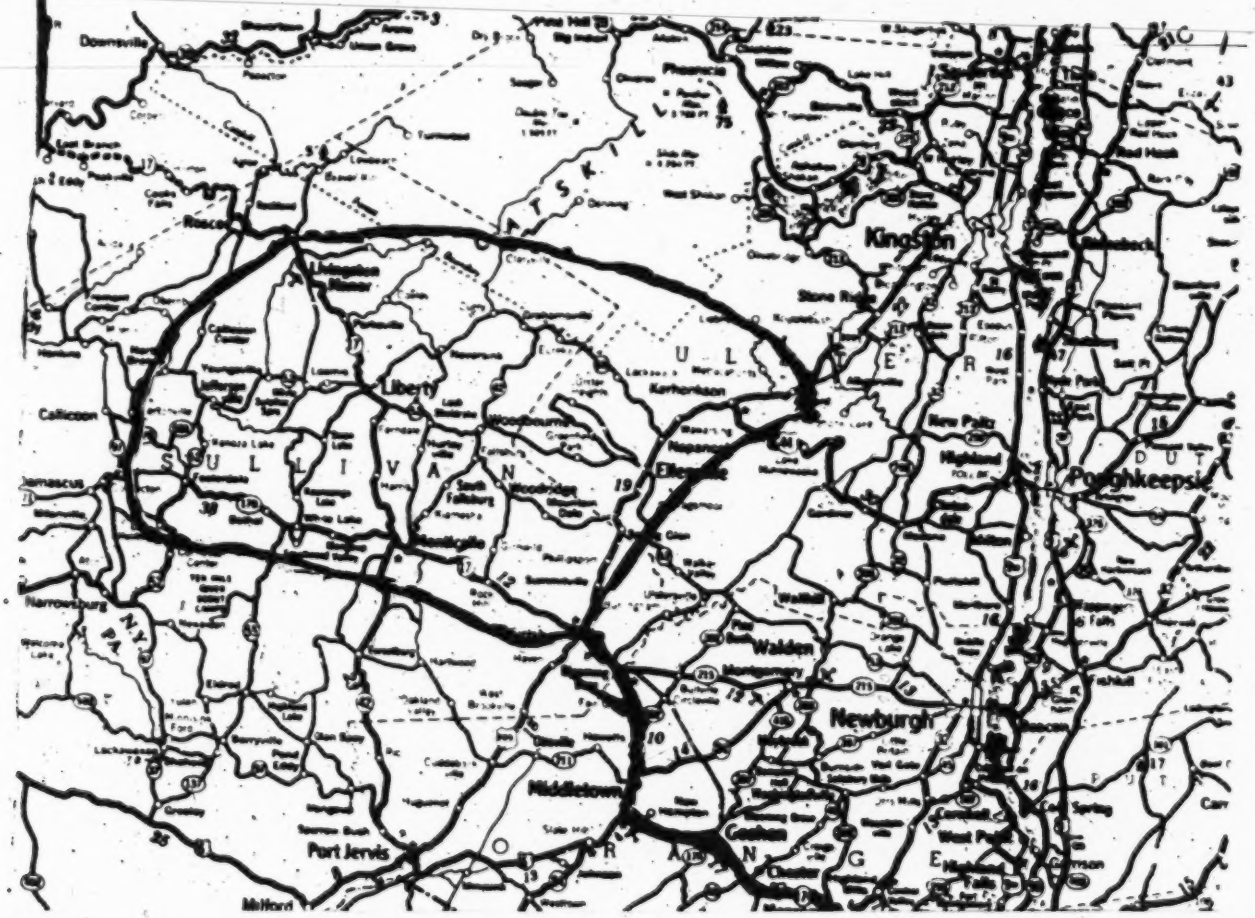
SUPPLEMENTAL EXHIBIT A

CRESCENT MOUNTAIN SERVICE
Applicant

Q.8. - A.I. Applicant transports passengers and baggage of passengers from the Borough of Bronx, City of New York, to Sullivan and Ulster Counties, New York, and more particularly to Woodburne, New York, in Sullivan County, and within a radius of twenty (20) miles from the town of Woodburne, New York.

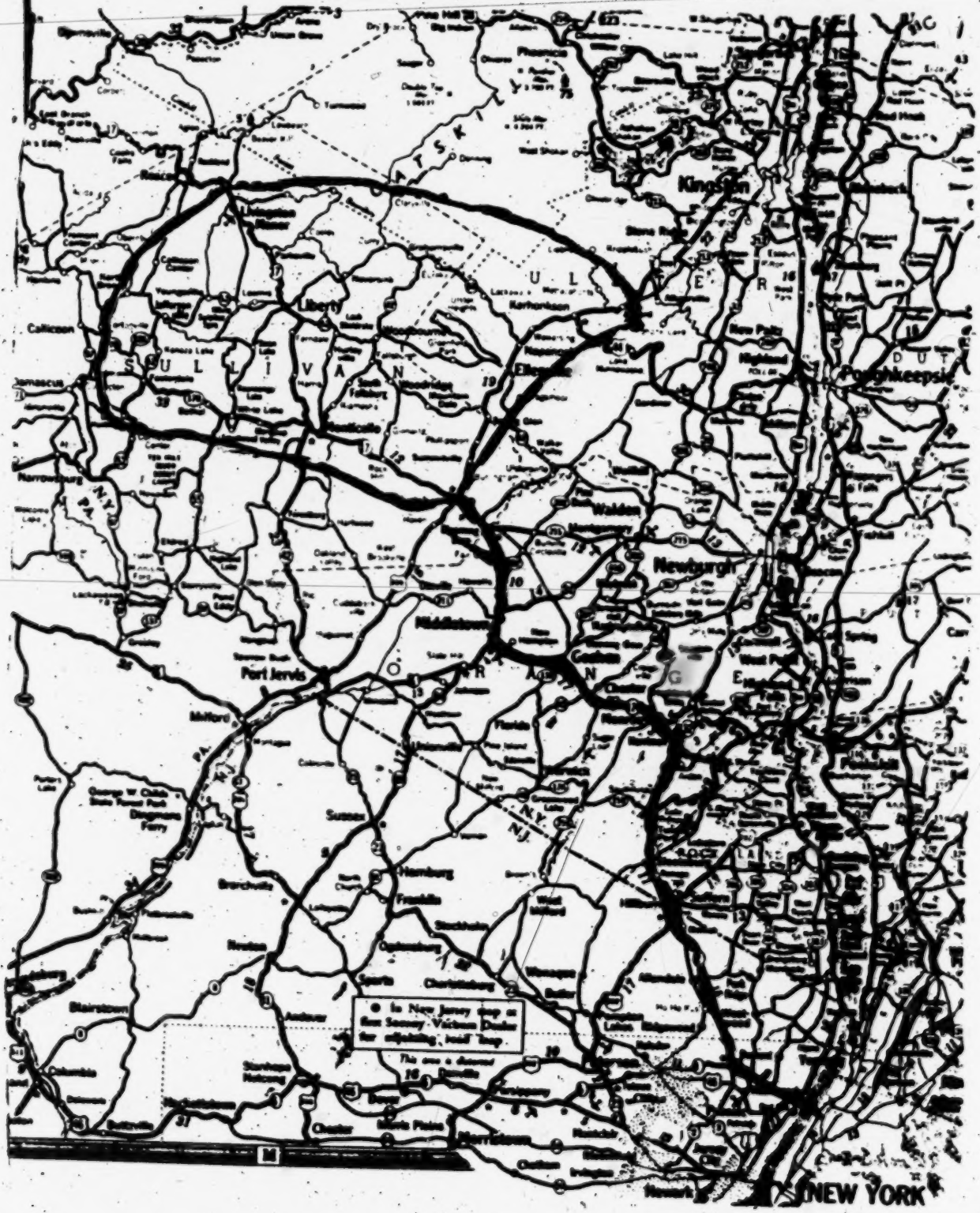
Applicant travels by way of George Washington Bridge to Fort Lee, New Jersey, thence northwest on New Jersey Route #4 to Bergenfield, New Jersey; thence north on New Jersey Route #2 to Suffern, New York; thence on New York Route #17 to Wurtsboro, New York, where traffic is distributed to the summer resorts within a radius of twenty (20) miles from Woodbourne, New York.

MAP SHOWING APPLICANT'S ROUTES AND POINTS SERVED:



on New York Route #17 to Wurtsboro, New York, where traffic is distributed to the summer resorts within a radius of twenty (20) miles from Woodbourne, New York.

MAP SHOWING APPLICANT'S ROUTES AND POINTS SERVED:



[fol. 102] Supplemental Exhibit A

Crescent Mountain Service

Applicant

Q. 8

A. I.—a. (1)

All intermediate points on the aforedescribed routes were not served. The applicant's main station in Sullivan County is located in Woodbourne, New York. The intermediate points served are located between Wurtsboro, New York, and Woodbourne, New York.

A. I.—a. (2)

The off-route points served are located within a radius of twenty (20) miles—north, east, south and west of Woodbourne, New York.

A. I.—b.

Baggage of the passengers is transported in addition to passengers; there is no express, mail or newspapers transported.

A. II.—a.

Applicant obtains its traffic in the Boroughs of Manhattan and Bronx, New York, and transports said traffic to the Counties of Sullivan and Ulster, in the State of New York. On return trips the applicant obtains its traffic in and about Woodbourne, New York, more specifically within a radius of twenty (20) miles from Woodbourne, New York, and transports such traffic to the five boroughs of New York City.

A. II.—b.

All of the applicant's operations are seasonal. Applicant transports passengers and baggage of passengers from the County of Bronx, New York, to the summer resorts of New York located in the Counties of Sullivan and Ulster. These operations are commenced in the month of June and continue up to the month of October.

[fol. 103] Supplemental Exhibit B

Crescent Mountain Service

Applicant

Q. 9 Exhibit	Date of Transaction	Point of Origin	Point of Destination
1935 Diary	May 30, 1935	Bronx, N. Y.	Kiamesha, N. Y.
Affidavits of Ida Kramer and Julius Weiss	May 30, 1935	Bronx, N. Y.	Kiamesha, N. Y.
Affidavit of Edna Livingston	Summer of 1934 and 1935	Bronx, N. Y. North Branch, N. Y.	North Branch, N. Y. Bronx, N. Y.
Affidavit of Adela Dingenthal	Summer of 1934 and 1935	Bronx, N. Y. Accord, N. Y.	Accord, N. Y. Bronx, N. Y.

Additional Evidence

Affidavit of Clarence B. Newhouse—Justice of Peace, Bloomingburg, N. Y.—evidence of use of route described in Schedule A.

Affidavit of Harris Trevax—evidence of history of Crescent Mountain Service—their business—sample business card used.

Affidavit of William Klumpp—evidence of employment by Crescent Mountain Service.

Affidavit of Israel Levine—evidence of rental of station in Bronx.

Affidavits of Isaac Feldman, Moe Bail, Harry K. Cohen—evidence of hotel-keepers familiar with Crescent Mountain Service.

Affidavit of Bella Sussman—evidence of transportation.

Affidavits of William L. Cairns and Arthur Gillip in—evidence of employment by Crescent Mountain Service.

Affidavit of New York Telephone Company—evidence of station in Woodbourne, N. Y., and telephone number.

Affidavit of Albert Baron, d.b.a., Bronx Commercial Press—evidence of old circulars.

Affidavit of Rueben Freed—evidence of use of route.

[fol. 104] Affidavits of Morris Glickman and Jacob Vangrofsky—certification of all the foregoing evidence.

Certificates of ownership of Morris Glickman, Herman Trevax, Jacob Vangrofsky, and Murray Galley.

Post-cards of Crescent Mountain Service showing phone-number stated by Telephone Company to have been in use during 1934.

Statements of Michael E. Nial, insurance agent, regarding past insurance.

[fol. 105] STATE OF NEW YORK,
County of New York, ss:

JACOB VANGROFSKY, being duly sworn, deposes and says:

I reside in the county of Bronx, city and state of New York and am a partner with Herman Trevax, Murray Galley and Morris Glickman in the business of transporting passengers between Bronx, N. Y., and points in Sullivan and Ulster Counties, New York by way of New Jersey. We operate under the trade name of Crescent Mountain Service.

It is our intention to change the name of "Crescent Mountain Service" to "Crescent Cadillac Lines". This change we intend to put on record within the coming week by filing of a certificate of doing business. We are therefore submitting certificate of insurance in conformance with the Interstate Commerce Commission regulation in the name of Crescent Cadillac Lines.

This change of name does not in any way change the parties in interest but is being done for the sake of a better business name.

Jacob Vangrofsky.

Sworn to before me this 15th day of January, 1938.
Milton Cotton, Notary Public, Westchester Co.

[fol. 106] New York Telephone Company

January 10, 1938.

This is to certify that the Crescent Mountain Service under the name of Morris Glickman had telephone service from 6/26/34 to 9/18/34. Telephone number Fallsburgh 186 W.

New York Telephone Co., A. Branch, Repr.

[fol. 107] STATE OF NEW YORK,
County of New York:

Reuben Freed, being duly sworn, deposes and says: I am the owner of Red Apple Rest, located in South Field, New York and have been operating a restaurant and gas station on said location under said name since 1930. I have known Jacob Vangrofsky, Morris Glickman, Murray Galley and Herman Trevax since 1933. They have been customers of mine in the purchase of gas and oil during 1933 and 1934. I have been doing business with Jacob Vangrofsky, Morris Glickman, Murray Galley and Herman Trevax during 1933 and 1934 when they operated under the trade name of Crescent Mountain Service. From personal observations and conversations had with passengers in their automobiles I know that they are engaged in the business of transporting passengers to and from points in Sullivan and Ulster Counties. My records show that they were engaged in this business during the years 1933 and 1934. During the periods of that year from May through September, their business being chiefly that of transporting residents of Bronx and New York City to and from summer resorts located in Sullivan and Ulster Counties. I am familiar with the various means that are used be people in traveling to and from these various summer resorts and know that the transportation facilities supplied by Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as the Crescent Mountain Service is a most convenient and necessary one for people using these resorts. The reason for their —— service is that they transport people to hotels located in all roads and by-roads, obviating the necessity of their passengers having to use foot or other extraordinary means to get to their actual [fol. 108] destination. These observations of mine are based upon conversations had personally with passengers in their automobiles and in other automobiles including buses.

Red Apple Rest, Inc. Reuben Freed, Pres.

Sworn to before me this 10th day of January, 1933.
Joseph E. Kelly, Notary Public.

[fol. 109] STATE OF NEW YORK,
County of Sullivan, ss:

William J. Cairns being duly sworn, deposes and says: I reside in the Town of Bloomingburg, New York, and have resided there since——. I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service since 1932 and they have been customers of mine since that time up to and including September, 1937. I am the owner of Lakeside Garage located at Bloomingburg, New York and my connection with the aforesaid Crescent Mountain Service has been that of repairing and storaging their automobiles. Our business connections have taken place during the summer months of each year since 1932 and I have also sold them gas and oil during the aforesaid periods. The Crescent Mountain Service owns and operates 7 - 7 passenger Cadillac Sedans. Their business is that of transporting passengers from Bronx, New York to various points of Sullivan and Ulster Counties. Since May, 1932, I have been paid by Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service for the services which I rendered to them and for the supplies which I sold them.

William J. Cairns.

Sworn to before me this 10th day of January, 1938.
Clarence B. Newhouse, Notary Public.

[fol. 110] STATE OF NEW YORK,
County of Sullivan, ss:

Arthur Gillespie being duly sworn, deposes and says: I reside in the Town of Bloomingburg, New York and have resided there for the last few years. I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman since 193— and know that they have been continuously since that time doing business under the name of Crescent Mountain Service. I have been employed since that time by William Cairns, who is the owner of Lakeside Garage in Bloomingburg. I have been doing mechanic repairs for Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service since 193— up to and including the

summer of 1937. From conversations had during that period with the owners and operators and passengers of cars owned by Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman doing business as Crescent Mountain Service, I know that they are in the business of transporting passengers between New York City and points in Sullivan and Ulster Counties. At various times prior to June 1, 1935 and since that time I have been personally called to make repairs for them in Wurtsboro, Rock Hill, Harriman and Goshen and various other points in Sullivan and Ulster Counties. From conversations with passengers in the other cars, I know that the said passengers were traveling between points in New York City and Sullivan and Ulster Counties. From my knowledge of the summer resorts at Sullivan and Ulster Counties to and from which the aforesaid passengers were traveling I know that the locations are such that the method of travel employed by the Crescent Mountain Service is the most convenient one available and possible.

Arthur Gillespie.

Sworn to before me this 10th day of January, 1938.
Clarence B. Newhouse, Notary Public.

[fol. 111] State of New York,
County of Sullivan, ss:

Bella Sussman, being duly sworn, deposes and says: I am the owner of the Onyx Club located in Woodbourne, New York and have owned this Club for the past ten (10) years. During this time I have been transported to New York City from my Club in Woodbourne to New York City and from New York City to my Club by Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service. Several times during each summer of 1932, 1933, 1934, 1935, 1936 and 1937 people employed by me including waiters and entertainers, musicians, cooks, have been transported by Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service from New York City to my Club and from my Club to New York City during the aforementioned period. Many guests at my night club have been transported by them in the same

manner. During the summer months of 1932, 1933, 1934, Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service had their place of business in Woodbourne, New York and had large signs advertising the fact that they transported passengers from Sullivan and Ulster Counties to New York City and from New York City to Sullivan and Ulster Counties hung in front of their place of business and on their cars parked in front of their business. They have had a telephone number in Woodbourne, New York and also in Bronx, New York.

Bella Sussman.

Sworn to before me this 10th day of January, 1938.
Samuel Paushi, Notary Public.

[fol. 112] State of New York,
County of Sullivan, ss:

Harry K. Cohen, being duly sworn, deposes and says: I reside in the hamlet of Woodbourne, N. Y., and am the owner of The Woodland Hotel at said address. I have resided at Woodbourne, N. Y., for over fifteen years, and have been in the hotel business during all of said times. I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman doing business as Crescent Mountain Service since May, 1932. Their business has been the transportation of guests of mine from New York City to my hotel and from my hotel to New York City. They have been engaged in this business from 1932 up to and including September 1937, operating only during the summer months from late May to late September. I have during said period several times during the summer months called their office located in Woodbourne, New York.

Harry K. Cohen.

Sworn to before me this 10th day of January, 1938.
Samuel Paushi, Notary Public.

[fol. 113] State of New York,
County of Sullivan, ss:

Moe Bail, being duly sworn, deposes and says: I reside in the Town of Woodbourne, New York. That I am one

of the owners of Bail's Oliver Hill Hotel located in the same town. I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service since 1932. We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City and from New York City to our hotel, during the summer months from late May to late September. I have also been transported by them from my hotel to New York City and from New York City to my hotel. During my passage I noticed that they have picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City and also that they have transported passengers from New York City to various other summer resorts in Sullivan County.

Moe Bail.

Sworn to before me this 10th day of January, 1938.
Samuel Paushi, Notary Public.

[fol. 114] State of New York,
County of New York:

Issi Feldman, being duly sworn, deposes and says: I reside and own real estate in the Town of Woodridge, New York. I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service since June 1932. They have, to my knowledge, been engaged in the business of transporting passengers between New York City and Sullivan and Ulster Counties since 1932. They operate seven 7 passenger Sedans and carry passengers to and from summer hotels located in Sullivan and Ulster Counties. I am the owner of the Flower Lake House located in Woodridge, New York. Guests who rent rooms in my hotel were brought to my hotel by the aforementioned, Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service, in cars owned by them and guests were likewise transported from my hotel back to their homes in New York. The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of transportation to and from my hotel since 1932

during the summer months from late May to late September, operating continuously during said summer months. From conversations with people who travel in said auto mobiles operated by said Crescent Mountain Service and from my own experience in traveling in other cars to and from New York City, I sincerely believe that their mode of transportation is extremely necessary and convenient both for my own and my guests needs.

Issi Feldman.

Sworn to before me this 10th day of January, 1938.
Milton Cotton, Notary Public, Westchester Co.
Ctf. filed N. Y. Co. #781. Comm. exp. 3/30/39.

[fol. 115] STATE OF NEW YORK,
County of Bronx, ss:

Israel Levine, being duly sworn, deposes and says: I am the owner of a store located at #531 East 169th Street, Bronx, N. Y. In May, 1934, Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman rented my store as a place of business for the purpose of using it as a station for transporting people from New York City to various points in Sullivan and Ulster Counties and for transporting people from Sullivan and Ulster Counties to New York City. They hung large signs in front of said store advertising the fact that they were running their automobiles to said points. A list of said points advertised are as follows:

Accord, Bethel, Bushville, Bradley, Dairyland, Ellenville, Fallsburg, Fosterdale, Ferndale, Greenfield Park, Glenwild, Hurleyville, Harris, Jeffersonville, Kiamesha, Kerhongson, Kenoza Lake, Livingston Manor, Luzon, Loch Sheldrake, Lake Huntington, Liberty.

During said year of 1934, 1935, 1936 and 1937, they used my store for said purpose of taking passengers for transportation to the said points in Sullivan and Ulster Counties for from Sullivan and Ulster Counties to New York City. They own and operate 7 - 7 passenger Cadillac Sedan cars which they use for said purpose. I have personally seen them arranging for said trips with passengers and driving their cars away and from conversations had with passen-

gers I know that they were going to points in Sullivan and Ulster Counties.

Israel Levine.

Sworn to before me this 14th day of January, 1938.
Jacob Tauss, Notary Public, #6 Bronx County.
Comm. exp. 3/30/38.

[fol. 116] STATE OF NEW YORK,
County of Bronx, ss:

William Klumpp, being duly sworn, deposes and says: I am the owner of an auto service garage at 3604-3rd Avenue, Bronx, N. Y. I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service since 1933. Since that time the aforesaid Crescent Mountain Service operated 7 - 7 passenger Cadillac Sedans, engaged in the business of transporting passengers from New York City to points in Sullivan and Ulster Counties and return. During said time I have been employed by them for the purpose of making mechanical repairs to their automobiles and also storaging their automobiles. I have been paid for such work during the summers of 1934, 1935, 1936, 1937. During 1934 I have had occasion to go into the State of New Jersey in order to assist them in bringing back a car which had been disabled on the road. From conversations with passengers and people in the vicinity of #531 East 169th Street, I know that during the months from late May to late September they have been engaged in the business of transporting passengers from New York City to Sullivan and Ulster Counties and return. I know that they have been engaged in that business since 1934 up to and including late September, 1937.

William Klumpp.

Sworn to before me this 13th day of January, 1938.
Jacob Tauss, Notary Public, #6 Bronx County.
Comm. exp. 3/30/38.

[fol. 117] STATE OF NEW YORK,
County of Sullivan, ss:

Clarence B. Newhouse being duly sworn, deposes and says: I reside in the Town of Bloomingburg, N. Y. I am an insurance broker and Justice of the Peace in Blooming-

burg, N. Y. I have known Jacob Vangrofsky, Herman Trevax, Morris Glickman, and Murray Galley, doing business as Crescent Mountain Service since the Spring of 1934. During the summer of 1934 they were engaged in the business of transporting passengers from New York City to various points in Sullivan and Ulster Counties. During the summer of 1934, as Justice of the Peace of Bloomingburg, N. Y. it was brought to my attention by State troopers to check the insurance coverage on all automobiles transporting passengers through Bloomingburg, N. Y. At that time I inspected the insurance carried by Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman who were then doing business under the trade name of Crescent Mountain Service. The insurance which they carried at that time was proper insurance and adequate for the purpose which I then required. Copies of insurance policies carried by them were submitted to me and said policies met all requirements of the State of New York. From information given to me by the policemen patrolling the highway in and around the vicinity of Bloomingburg I know that Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service were engaged in the transportation of passengers from Bloomingburg, New York to various points in Sullivan and Ulster Counties by way of highways #17 in New York and highways #2 and #4 in New Jersey.

I have been a Justice of the Peace in the Town of Bloomingburg, New York since 1929 and none of the aforemen-
[fol. 118] tioned persons doing business as Crescent Mountain Service or employees of theirs have ever been brought before me on any sort of criminal charge regarding the driving and operation of their vehicle.

Clarence B. Newhouse.

Sworn to before me this 10th day of January, 1938.
James T. Meiklejohn, Notary Public.

[fol. 119] Docket #MC 78980

STATE OF NEW YORK,
County of Bronx, ss:

Adela Dingenthal being duly sworn, deposes and says: That I reside at 414 E. 169 St., Bronx, City of N. Y. C., State of N. Y.

That I know Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley and have known them since 1933. I know that they operate under the trade name of Crescent Mountain Service and that they are engaged in the business of transporting passengers from Bronx, New York to points in Sullivan and Ulster Counties in New York State using a route through the State of New Jersey. In the summer of 1933 and in the summer of 1934 I hired the aforesaid persons to transport me and my family from their office located at #531 East 169th Street, Bronx, N. Y. to Accord in the County of Ulster, New York. That thereafter and during said summer the aforesaid company did transport me and my family in one of their cars to Accord, in the County of Ulster, State of New York. That after bringing my family up to Accord, County of Ulster, State of New York, I engaged the aforesaid Crescent Mountain Service operated by Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley to transport me back to Bronx, New York. That during the said summers of 1933 and 1934 I was transported by said Crescent Mountain Service operated by the said Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley several times between Bronx, New York and Accord, County of Ulster, State of New York, using a route in New Jersey in order to get to the point of destination. A specific [illegible] [fol. 120] upon which I travelled going back and [illegible] from and to the aforementioned points were as follows:

From New York City to Fort Lee, New Jersey via George Washington Bridge

From Fort Lee, New Jersey to Bergenfield, New Jersey via Highland, New Jersey, #4

From Bergenfield, New Jersey to Suffern, New York via New Jersey #2

From Suffern to Wurtsboro via Route 17

From Wurtsboro, New York to Accord, via route 209, N. Y.

On return from Accord to Bronx, N. Y., the same route was used. My family and myself have been using Crescent Mountain Service, operated by Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley since 1933 up to and including the summer of 1937 in going to and from Accord, N. Y. Riding with us at the times that we were transported to Accord by the aforementioned Cres-

cent Mountain Service were other passengers who were transported to various other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Summitville, Phillipsport, Ellenville, Spring Glen, Napanoch and Kerhonkson.

My family and I have personally found that this method of transportation is most convenient and the most economical for our purpose and that we would be greatly prejudiced if we were unable to travel to our summer resort by this means. The service has always been safe, comfortable and convenient. I have no personal interest in making this affidavit other than the fact that I would be greatly inconvenienced if this service were withdrawn.

Adela Dingenthal.

Sworn to before me this 14th day of January, 1938.
Jacob Tauss, Notary Public, #6 Bronx County.
Comm. exp. 3/30/38.

[fol. 121] Docket #MC 78980

State of New York,
County of Bronx, ss:

Edna Livingston, being duly sworn, deposes and says: That I reside at 1372 Franklin Ave., City of Bronx, State of New York.

That I know Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley and have known them since 1933. I know that they operate under the trade name of Crescent Mountain Service and that they are engaged in the business of transporting passengers from Bronx, New York to points in Sullivan and Ulster Counties in New York State using a route through the State of New Jersey. In the summer of 1933 and in the summer of 1934 I hired the aforesaid persons to transport me and my family from their office located at #531 East 169th Street, Bronx, N. Y. to North Branch, in the County of Sullivan, New York. That thereafter and during said summer the aforesaid company did transport me and my family in one of their cars to North Branch, in the County of Sullivan, State of

New York. That after bringing my family up to North Branch, County of Sullivan, State of New York, I engaged the aforesaid Crescent Mountain Service operated by Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley to transport me back to Bronx, New York. That during the said summers of 1933 and 1934, I was transported by said Crescent Mountain Service operated by the said Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley several times between Bronx, New York and North Branch, County of Sullivan, State of New York, using a route in New Jersey in order to get to the point of destination. A specific route upon which I travelled going [fol. 122] back and forth from and to the aforementioned points was as follows.

From New York City to Fort Lee, New Jersey via George Washington Bridge

From Fort Lee, New Jersey to Bergenfield, New Jersey via Highland, New Jersey #4

From Bergenfield, New Jersey to Suffern, New York, via New Jersey #2

From Suffern to Monticello vis Route 17

From Monticello, New York to North Branch, N. Y., via Route 17 B

On return from North Branch, New York to Bronx, N. Y., the same route was used. My family and myself have been using Crescent Mountain Service, operated by Jacob Vangrofsky, Morris Glickman, Herman Trevax and Murray Galley since 1933 up to and including the summer of 1937 in going to and from North Branch, New York. Riding with us at the times that we were transported to North Branch, New York by the aforementioned Crescent Mountain Service were other passengers who were transported to various other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake.

My family and I have personally found that this method of transportation is most convenient and the most economical for our purposes and that we would be greatly prejudiced if we were unable to travel to our summer resort by this means. The service has always been safe, comfortable and convenient. I have no personal interest in making this

affidavit other than the fact that I would be greatly inconvenienced if this service were withdrawn.

Mrs. Edna Livingston.

Sworn to before me this 14th day of January, 1938.
Jacob Tauss, Notary Public, #6 Bronx County.
Exp. 3/30/38.

[fol. 123] State of New York,
County of Bronx, ss:

Harris Trevax, being duly sworn, deposes and says:

That I reside at 1372 Franklin Avenue, Borough of Bronx, City and State of New York.

That from 1924 to 1934 I was the owner of a garage located at 3604 Third avenue, Borough of Bronx, City and State of New York, which I operated under the name of Crescent Garage. I operated a general garage business from that address.

In the summer of 1928, my son, Herman, conceived of the idea of transporting passengers from Bronx, N. Y. to the summer resorts in Sullivan and Ulster Counties. He purchased a seven-passenger Buick, procured omnibus license plates, and proceeded to carry out this business. He used my garage at the above address as his main station. My wife and I helped him out by answering phone calls and booking work. I charged him no rent for this use. Attached hereto is sample card which he distributed to prospective customers. The original telephone number in the upper left hand corner was the telephone number of my garage.

In 1930, Murray Galley joined my son in this enterprise and Murray Galley also purchased a seven-passenger car for the purpose of transporting passengers from Bronx, N. Y. to and from Sullivan and Ulster Counties.

In 1932, Morris Glickman also purchased an automobile and joined Murray Galley and my son in the business of transporting passengers between Bronx, N. Y. and Sullivan and Ulster Counties.

[fol. 124] In 1933, Jacob Vangrofsky, also purchased an automobile and joined Morris Glickman, Murray Galley, and my son in the business of transporting passengers between Bronx, N. Y. and Sullivan and Ulster Counties.

During all of this time, my garage was used as the station for their operations. In 1934, I sold my garage, as a result of which, the partnership of Morris Glickman, Murray Galley, Jacob Vangrofsky and my son moved their station aroung the corner to 531 East 169th St., Bronx, N. Y.

Sometime, in 1932, I consented to allow the partnership to use the name of Crescent Mountain Service, under which name they have since been operating.

Harris Trevax.

Sworn to before me this 14th day of January, 1938.
Jacob Tauss, Notary Public, #6 Bronx County.
Comm. exp. 3/30/38.

Tel [illegible]

HERMAN TREVAX

DAILY TRIPS to and from MOUNTAINS

at the LOWEST RATES

[illegible]

Phone Fallsburg 186 W

CRESCENT -- MOUNTAIN -- SERVICE

7 Passenger Cars

TO NEW YORK

State of New York }
County of Bronx } ss.

Albert Baron, being duly sworn deposes and says:

I reside in Bronx, New York and am in the printing business, having been so engaged for the past 10 (ten years) with a place of business at 555 E. 169th Street, Bronx, N.Y.

In May, 1934, I was employed by Jacob Vangrofsky, Herman Trevis, Murray Gilday and Morris Glickman, doing business as Crescent Mountain Service to print several of the signs similar to the one on the reverse side of this affidavit. I printed the one on the reverse side and many others and Crescent Mountain Service paid me for them. I also printed business cards and post-cards for them at the same time

Albert Baron

Sworn to before me this
14th day January, 1938.

Notary Public
#6 Bronx County
Comm. Exp. 3/30/38

7 PASSENGER CARS 7

LEAVING DAILY TO ALL PARTS OF THE

MOUNTAINS AT LOWEST PRICES

Monticello	*Liberty*	*Ellinville*
Ferndale	*Swan Lake*	*Kerhonkson*
Loch Shedrake	*Fallsburg*	*Accord*
Parksville	*Livingston Manor*	*Kiamicha*

FROM YOUR HOME TO YOUR HOTEL

Boarding and Rooming Accomodating if Desired

Please call to see us at our residence about reservation

Name..... Address.....

Date..... Time..... Apt.....

Crescent Mountain Service 531 E. 169th St.

Tel JE[illegible]e 6-8445-8451 Mountain Tel. Fallsburg 186 W [illegible]ronx, N. Y.

Protestant will appear and give evidence in support of this protest in the event of a hearing on applicant's application. Check(X)

THE PROTESTANT SHOULD SUBMIT ON SEPARATE SHEETS ATTACHED TO THIS PROTEST DETAILED FACTS IN SUPPORT OF ANY OF THE ABOVE GROUNDS UPON WHICH PROTESTANT RELIES.

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY

By Leland Taliaferro
Protestant. (~~Practitioner~~)

Address: 80 Park Place (Street), Newark (City), New Jersey (State)

County of Essex)
) ss.
State of New Jersey)

Leland Taliaferro, being duly sworn deposes and says: That he ~~is the protestant (or one of the protestants)~~ is the Real Estate and Tax Attorney of the Public Service Interstate Transportation company, protestant); that he has read the foregoing protest and knows the contents thereof and that the same, including the contents of statements attached thereto are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

Leland Taliaferro.

Subscribed and sworn to before me this 29th day of November, 1937.

_____, ~~Clerk~~

Anne M. Marrs
(Notary Public)

NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JULY [illegible] 1940

133



Crescent Mountain Service

531 East 169th St.

Bronx, N[redacted] Y.

129

7 PASSENGER CARS 7

LEAVING DAILY TO ALL PARTS OF THE

MOUNTAINS AT LOWEST PRICES

Monticello	*Liberty*	*Ellinville*
Ferndale	*Swan Lake*	*Kerhonkson*
Loch Shedrake	*Fallsburg*	*Accord*
Parksville	*Livingston Manor*	*Kiamjcha*

FROM YOUR HOME TO YOUR HOTEL.

Boarding and Rooming Accomodating if Desired

Please call [illegible] about reservation

Name ..... Address .....

Date ..... Time ..... Apt .....

Crescent Mountain Service 531 E. 169th St.

Tel. JEr[illegible] 6-8445 8451 Mountain Tel. Fallsburg 186 W [illegible]ux, N. Y.

Place
Stamp
Here

Crescent Mountain Service

531 East 169th St.

Bronx, N. Y.

131

// Fate no 78980

2822881 NOV3037 326851

INTERSTATE COMMERCE COMMISSION
RECEIVED
DEC 1 1937
SECTION OF CERTIFICATES & INS.

PROTEST OPPOSING CERTIFICATE OR PERMIT UNDER THE "GRANDFATHER CLAUSE" OF MOTOR CARRIER ACT, 1935

78980

to

CRESCENT MOUNTAIN SERVICE
Name of Applicant

INTERSTATE COMMERCE COMMISSION
NOV 30 1937
SECTION OF MAILS AND FILES

To the Bureau of Motor Carriers,
Interstate Commerce Commission,
Washington, D. C.:

Whereas the undersigned protestant is informed that CRESCENT MOUNTAIN SERVICE, hereinafter referred to as the "applicant", whose principal place of business is in the City of Bronx, State of New York, has applied to the Interstate Commerce Commission for (X) a Certificate of Public Convenience and Necessity as a common carrier, or (_) a Permit as a contract carrier of (X) Passengers or (_) Property (check whichever is applicable), under the "Grandfather clause" of Section 206 (a) or 209 (a) of the Motor Carrier Act, 1935:

The protestant hereby objects to the granting of such application, for the following reasons:

(Protestant will check the applicable reason or reasons)

(_) Because neither the applicant nor its predecessor in interest was in bona fide operation on the date which determined eligibility for rights under the "grandfather" provisions, to-wit, June 1, 1935, for a common carrier or July 1, 1935, for a contract carrier.

MOUNTAIN SERVICE, hereinafter referred to as the "applicant", whose principal place of business is in the City of Bronx, State of New York, has applied to the Interstate Commerce Commission for (X) a Certificate of Public Convenience and Necessity as a common carrier, or (_) a Permit as a contract carrier of (X) Passengers or (_) Property (check whichever is applicable), under the "Grandfather clause" of Section 206 (a) or 209 (a) of the Motor Carrier Act, 1935:

The protestant hereby objects to the granting of such application, for the following reasons:

(Protestant will check the applicable reason or reasons)

(_) Because neither the applicant nor its predecessor in interest was in bona fide operation on the date which determined eligibility for rights under the "grandfather" provisions, to-wit, June 1, 1935, for a common carrier or July 1, 1935, for a contract carrier.

(X) Because the operation of applicant, on whichever of such dates determines its eligibility, was not conducted over the entire route or within the entire territory claimed in the application.

(_) Because since said date determining eligibility, applicant or its predecessor in interest has not operated continuously over all or part of the route or territory described in the application.

(_) Because the type of service rendered by applicant or the nature and extent of the business of applicant, upon whichever of such dates determines its eligibility, or between such date and the filing of said application, was not as claimed in the application.

Protestant merely requests restriction on business between New York City and points in Bergen County, New Jersey

( ) Because of the existence of some other fact or circumstance, not hereinabove indicated which may properly be raised in opposition to the granting of said application, a more detailed statement of which ground is attached hereto.

The protestant is interested in this matter because

it operates in regular service between New York City and points in Bergen County, New Jersey

(Here state briefly the position and interest of protestant in the application)

Protestant will appear and give evidence in support of this protest in the event of a hearing on applicant's application. Check(X)

THE PROTESTANT SHOULD SUBMIT ON SEPARATE SHEETS ATTACHED TO THIS PROTEST DETAILED FACTS IN SUPPORT OF ANY OF THE ABOVE GROUNDS UPON WHICH PROTESTANT RELIES.

PUBLIC SERVICE INTERSTATE TRANSPORTATION COMPANY

By Leland Taliaferro
Protestant. (~~Practitioner~~)

Address: 80 Park Place (Street), Newark (City), New Jersey (State)

County of Essex)
) ss.
State of New Jersey)

Leland Taliaferro, being duly sworn deposes and says: That he ~~is the protestant (or one of the protestants) herein~~ is the Real Estate and Tax Attorney of the Public Service Interstate Transportation company, protestant); that he has read the foregoing protest and knows the contents thereof and that the same, including the contents of statements attached thereto are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

[fol. 134] Restrictions Requested

I. C. C. Docket No. 78980

MC 5A

Bureau of Motor Carriers, Interstate Commerce Commission, Washington, D. C.

GENTLEMEN:

The following is the result of our investigation of application filed under the Grandfather clause:

1. Name and Address of Applicant: Crescent Mountain Service, 531 East 169th St., Bronx, N. Y.

2. Interstate Certificates and Permits:

Answer the following questions as to each State requiring an interstate certificate or permit in or through which the applicant is applying to operate:

(a) Does applicant possess an Interstate certificate or permit under the laws of the State of ——? — Yes — No.

If answer is "Yes" give number and character of certificate or permit, i.e., common carrier, charter carrier. (Group and party, sightseeing.)

(b) On what date was such certificate or permit issued? ——

Attach copy of Commission order if possible. If Commission order is attached, omit answers to question (d).

(d) Does the route or routes applied for by the applicant correspond with route or routes authorized by his certificate or permit? — Yes — No. If not, how does it differ?

(e) Has applicant been denied an interstate certificate or permit? — Yes — No.

If so, give State Commission docket number and date of order: ——.

[fol. 135] 3. Type of Service and Routes and Territory Served.

(A) Common Carrier: Answer the following questions as to each route and territory applied for:

(1) Whether or not applicant operated over the route or in the territory prior to June 1, 1935, and has continued to

operate since June 1, 1935? If answer is "No," state what part of route or territory applicant did not operate:

This applicant is believed to have operated irregularly and seasonally from New York City to points in Sullivan and Ulster Counties, N. Y. We are informed that the applicant has failed to comply with certain laws in the State of New Jersey covering passenger transportation and this operation is believed to be illegal.

(2) Frequency of operation (daily, twice a day, etc.)?

(3) Did applicant serve all intermediate points? (If answer is "No," indicate exceptions.)

(B) Charter Carrier: (Group and Party, Sightseeing).

(1) What routes or within what territory is applicant applying for that he did not operate over or within prior to July 1, 1935?

4. Remarks: ——.

The above statements are true and correct to the best of my information and belief:

Motor Carrier Committee, Official Classification Territory Lines, A. R. Eldred, Manager.

[fol. 136] [Stamp:] Interstate Commerce Commission. Received Feb. 28, 1938. Section of Certificates & Ins.

Feb. 11, '38 363510

Interstate Commerce Commission, Bureau of Motor Carriers, Washington, D. C.

Attention: Mr. W. Y. Blanning, Director

GENTLEMEN:

Re: Application #78980. Finance #156066

We, Jacob Vangrofsky, Herman Trevax, Murray Galley, and Morris Glickman, d/b/a Crescent Mountain Service, application #78980, desire to adopt and use the trade name of "Crescent Cadillac Lines":

Dated at New York, N. Y., February 5, 1938.

Jacob Vangrofsky, Morris Glickman, Herman Trevax, Murray Galley.

GWY:im

[fol. 137] February 25, 1938.

Please refer to file Finance: #156,066.

Mr. Milton Cotton, Cotton & Freundlich, Counselors at Law, 1440 Broadway, New York, N. Y.

Dear Mr. Cotton:

Receipt is acknowledged of your letter of recent date, and statement over signatures of Jacob Vaugrofsky, Herman Trevax, Murray Galley, and Morris Glickman, d/b/a Crescent Mountain Service, application No. 78980, indicating that they desire to adopt the trade name of "Crescent Cadillac Lines".

We are advising our Sections of Certificates and Insurance and Traffic of your client's desire to effect the change in trade name referred to above.

Very truly yours, W. Y. Blanning, Director.

Cy—Mr. R. K. Hagarty, District Director, District No. 2.

[fol. 138] Order SC-51

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 3rd day of March, A. D. 1938.

No. MC 35502—D. Carl Musser, Mechanicsburg, Pennsylvania.
No. MC 35905—David E. Keefer, Needmore, Pennsylvania.
No. MC 38373—Russell E. Snyder, Doing Business as Russell E. Snyder Ice & Coal Dealer, Shickshinny, Pennsylvania.
No. MC 39241—John H. Miller, Lykens, Pennsylvania.
No. MC 44272—Kaufman Circle Express Co., Inc., New York City, New York.
No. MC 44788—Raymond Matheny, Webster Springs, West Virginia.
No. MC 44833—Norman M. Eckrote, Drums, Pennsylvania.
No. MC 45273—Howard S. Weikel, Junedale, Pennsylvania.
No. MC 47770—William A. Ruth, Doing Business as Ruth Trucking Co., East Berlin, Pennsylvania.
No. MC 47867—Lincoln Habblett, Dallas, Pennsylvania.

No. MC 47868—Claude S. Hall, Fairdale, Pennsylvania.
No. MC 47905—Jaba Trucking Corp., Brooklyn, New York.
No. MC 49042—Joseph Hugert, Ashley, Pennsylvania.
No. MC 49483—Ernest Myers, Wapwallopen, Pennsylvania.
No. MC 49164—Stanley J. Zukosky, Ashley, Pennsylvania.
No. MC 51664—Frank Petruzzi, Hazelton, Pennsylvania.
No. MC 51667—Alfred S. Perry, Worcester, Massachusetts.
No. MC 52178—Louis Wolff, New York City, New York.
No. MC 52194—R. W. Wentz, Doing Business as R. W. Wentz Furniture Co., Gettysburg, Pennsylvania.
No. MC 54334—Harry W. Kosier, Lykens, Pennsylvania.
No. MC 55011—Truman Ernest Horner, Highspire, Pennsylvania.
No. MC 55638—L. A. Stine, Freeland, Pennsylvania.
No. MC 56102—Nathan Lyons, Cold Spring, New York.
No. MC 56117—Anna D. Lorentz, Sutton, West Virginia.
No. MC 56228—Andy Kovacic, Forest City, Pennsylvania.
No. MC 56237—Gurney E. Knorr, Lykens, Pennsylvania.
No. MC 56494—Albert Kenthack, Mountain Top, Pennsylvania.
No. MC 59515—Chester Marshall & John Kamor, Doing Business as Chester Marshall, Wyoming, Pennsylvania.
No. MC 60487—L. B. Smith, Mount Union, Pennsylvania.
No. MC 37067—Vincent—a Nesi, Boonton, New Jersey.
[fol. 139] No. MC 61835—John & Merrill Covalt, Needmore, Pennsylvania.
No. MC 62052—Orville P. Adney, Doing Business as Delta Fast Freight Line, Memphis, Tennessee.
No. MC 62330—Wayne Kinner, Montrose, Pennsylvania.
No. MC 62487—O. S. Forshay, Huntingdon, Pennsylvania.
No. MC 64229—A. R. Wilcox, Montrose, Pennsylvania.
No. MC 64507—Elwyn A. Wagner, Kankakee, Illinois.
No. MC 65168—John Rauert, Doing Business as J. R. Trucking, New York City, New York.
No. MC 68410—S. J. Mays, Maysville, Oklahoma.
No. MC 70756—Howard King, Springwater, New York.
No. MC 72067—Elmer H. Gilbert, Doing Business as Momence Delivery Service, Momence, Illinois.
No. MC 77991—Herman Adelson, Chicago, Illinois.
No. MC 78980—Herman Trevax, Jacob Vangrofsky, Murray Galley, Morris Glickman, Doing Business as Crescent Mountain Service, Bronx, New York.
No. MC 79753—Horace M. Schaeffer, Fleetwood, Pennsylvania.

No. MC 80475—Herbert L. Anderson, Doing Business as Superior Teaming Co., Chicago, Illinois.
No. MC 79948—T. P. Jones, Wainwright, Oklahoma.
No. MC 80850—Charles Ahrens, Doing Business as Chas. Ahrens & Sons, Chicago, Illinois.
No. MC 80852—Edward R. Alban, Doing Business as E. R. Alban Cartage Contractor, Chicago, Illinois.
No. MC 87316—John Kraemer, Doing Business as Active Messenger Service, Chicago, Illinois.
No. MC 61436—B. V. Johnson, Oklahoma City, Oklahoma.
No. MC 62670—J. C. Parker, Claremore, Oklahoma.
No. MC 62877—Cruthfield and Beard, a Partnership, Winston-Salem, North Carolina.

It appearing, That the above-named applicants made application for appropriate authority to continue to operate as motor carriers or brokers, under the Motor Carrier Act, 1935;

It further appearing, That said applicants have refused or failed to comply with various requests to furnish the facts and evidence necessary to the proper disposition of their applications; therefore,

It is ordered, That the said applicants shall answer to this Commission within thirty days from the date thereof, in a writing verified under oath, showing cause why their applications should not be dismissed for want of prosecution.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

MAR 1938 385219

MILTON COTTON

COUNSELLOR AT LAW

INTERSTATE COMMERCE COMMISSION RECEIVED MAR 10 1938 SECTION OF CERTIFICATES & PERMITS

March 7, 1938.

INTERSTATE COMMERCE COMMISSION RECEIVED MAR 10 1938 SECTION OF MAILS AND FILES

Interstate Commerce Commission,
Division 5,
Washington, D. C.

Gentlemen:

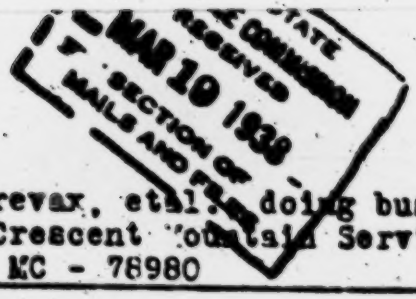
Re: Herman Trevax, etal, doing business as Crescent Mountain Service
MC - 78980

On March 7, 1938, I received from your office an order precluding my client, the above-named from proceeding further with the above application for a permit to operate as a motor carrier, unless proper affidavit were submitted to your office showing cause to the contrary.

On January 15, 1938, I appeared with my client at the District Office at 60 Hudson St., N. Y., and we submitted evidence under the "Grandfather's Clause". My information from the Examiner was to the effect that our evidence was proper and sufficient at that time. I am therefore at a loss to understand why my client was included in your order of March 7.

I am enclosing herewith several original copies

Interstate ommerce Commission,
Division f,
"ashington, D. C.



Gentlemen: Re: Herman Trevax, etal. doing business as Crescent ountain Service
MC - 78980

On March 7, 1938, I received from your office an order precluding my client, the above-named from proceeding further with the above application for a permit to operate as a motor carrier, unless proper affidavit were submitted to your office showing cause to the contrary.

On January 1?, 1938, I appeared with my client at the District office at 60 Hudson St., N. Y., and we submitted evidence under the "Grandfather's Clause". My information from the examiner was to the effect that our evidence was proper and sufficient at that time. I am therefore at a loss to understand why my client was included in your order of March.

I am enclosing herewith several original copies of affidavit and order vacating order # MC - 1 insofar as it concerns my client.

Will you kindly wire me collect at the above address of the signing of the enclosed order or of a refusal so to do so that my client may not be prejudiced because of lack of time.

140

MAR1938 385219

MILTON COTTON
COUNSELLOR AT LAW
1440 BROADWAY
NEW YORK

LACKAWANNA 4-0646

2- I.C.C. - re: Crescent

Thanking you in anticipation of a prompt and favorable response herein,

Very truly yours,

MILTON COTTON

M:M

- - - - - - - - - - - - - - - - - - - -x

In the Matter of the Application of

HERMAN FRIEVAX, JACOB VANGROFSKY, MURRAY GALLEY, MORRIS GLICKMAN, doing business as CRESCENT MOUNTAIN SERVICE - 78980

for authority to continue to operate as motor carriers, under the Motor Carrier Act, 1935.

- - - - - - - - - - - - - - - - - - - -x

State of New York)
County of New York) ss:

JACOB VANGROFSKY, being duly sworn, deposes and says:

That I am a member of the above-mentioned partnership applicant, and am familiar with the above-mentioned proceeding.

That the above applicant was duly notified to appear and submit facts and evidence on January 11, 1938. An adjournment was made to January 15, 1938. On January 15, 1938, MORRIS GLICKMAN and I appeared with our attorney, MILTON COTTON, Esq., at the New York District office of the Interstate Commerce Commission and submitted facts and evidence in support of our application.

That since that time, we applied to the Interstate Commerce Commission for leave to change our trade name to "CRESCENT CADILLAC LINES", and we were advised that said application has been granted.

INTERSTATE COMMERCE COMMISSION
MAR 1 1938

Wherefore I pray that an order be entered herein, vacating order No. 30-51, dated March 3rd, 1938, insofar as it

doing business as CRESCENT
MOUNTAIN SERVICE - 78980

for authority to continue to operate as motor carriers, under the Motor Carrier Act, 1935.

- -x

State of New York)
County of New York) ss:

JACOB VANGROFSKY, being duly sworn, deposes and says:

That I am a member of the above-mentioned partnership applicant, and am familiar with the above-mentioned proceeding.

That the above applicant was duly notified to appear and submit facts and evidence on January 11, 1938. An adjournment was made to January 15, 1938. On January 15, 1938, MORRIS LICHMAN and I appeared with our attorney, MILTON COTTON, ESQ., at the New York District office of the Interstate Commerce Commission and submitted facts and evidence in support of our application.

That since that time, we applied to the Interstate Commerce Commission for leave to change our trade name to "CRESCENT CADILLAC LINES", and we were advised that said application has been granted.

INTERSTATE COMMERCE COMMISSION
MAR 4 1938
CERTIFICATES & INS.

Wherefore I pray that an order be entered herein, vacating order No. 50-51, dated March 3rd, 1938, insofar as it concerns the above-named applicant, and for such other and further relief as in the premises may seem just and equitable.

Jacob Vangrofsky

142

State of New York)
) SS:
County of New York)

JACOB VANGROPSKY, affiant makes oath and says that he is a partner of the applicant, CRESCENT MOUNTAIN SERVICE, applicant for a certificate and/or permit, that he has personal knowledge of the statements made herein, and that all matters herein are a true and correct statement of fact to the best of his knowledge and belief.

Jacob Vangropsky

Subscribed and sworn to before me, a notary public in and for the State and County above named this 15th day of March, 1938. My Commission expires March 30, 1939.

Milton Cotton

MAR 19 '38 385219

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the day of March, A. D. 1938.

- - - - - - - - - - - - - - - - - -x

In the Matter of the Application of

HARMAN FREYAX, JACOB VANGROFSKY, MURRAY GALLEY, MORRIS GLICKMAN, doing business as CRESCENT MOUNTAIN SERVICE - MC 78980

for authority to continue to operate as motor carriers, under the Motor Carrier Act, 1935.

- - - - - - - - - - - - - - - - - -x

It Appearing, That the above-named applicant made application for appropriate authority to continue to operate as motor carriers, under the Motor Carrier Act, 1935;

It further Appearing, That said applicants have complied with request to furnish the facts and evidence necessary to the proper disposition of their application; therefore,

It is ordered, that the order entered herein on the 3rd day of March, 1938, order # MC-51, insofar as it concerns the above-named applicant, be and the same is hereby vacated.

By the Commission, Division 5,

MAY-5'38 413415

...MISSION
...ED
MAY 5 1938
...TION OF
CERTIFICATES AND...

MILTON COTTON
COUNSELLOR AT LAW
1440 BROADWAY
NEW YORK
—
LACKAWANNA 4-0646

INTERSTATE
COMMERCE COMMISSION
RECEIVED
MAY 5 1938
SECTION OF
MAILS AND FILES

May 4, 1938.

Mr. W. Y. Blanning,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Re: Docket No. 531 [illegible]819
78980
Crescent Mountain Service
or Crescent Cadillac Lines

Dear Sir:

Pursuant to your letter dated March 25, 1938, in regard to the above-mentioned applicant, please be advised that pursuant to instructions in said letter, the applicant contacted the New York District office, and thereafter, a hearing was had and evidence submitted relative to the preservation of applicant's rights under the "grandfather" clause. We were advised that we would hear from your office within a short time. This was on April 7, 1938.

Will you be so kind as to advise the writer as to the exact position of the applicant at the present time with regard to when he will receive official plates, or as to whether it is necessary for him to meet some further requirements under the Motor Carrier Act.

per 1

Mr. W. Y. Blanning,
Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

SECTION OF MAILS AND FILES

Re: Docket No. 531-385219
78980
Crescent Mountain Service
or Crescent Cadillac Lines

Dear Sir:

Pursuant to your letter dated March 25, 1938, in regard to the above-mentioned applicant, please be advised that pursuant to instructions in said letter, the applicant contacted the New York District office, and thereafter, a hearing was had and evidence submitted relative to the preservation of applicant's rights under the "grandfather" clause. We were advised that we would hear from your office within a short time. This was on April 7, 1938.

Will you be so kind as to advise the writer as to the exact position of the applicant at the present time with regard to when he will receive official plates, or as to whether it is necessary for him to meet some further requirements under the Motor Carrier Act.

I thank you for your past helpfulness herein, and trust I may receive an immediate favorable reply.

Very truly yours,

MC: my

[fol. 146] Order C-1

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 7th day of May, A. D. 1938.

No. MC 78980

Application of Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a Partnership, doing business as Crescent Mountain Service, Bronx, N. Y.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall

show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission. Otherwise such protests shall be denied.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 147] Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 7th day of May, A. D. 1938.

No. MC 78980

Application of Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a Partnership, doing business as Crescent Mountain Service, Bronx, N. Y.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:

Between New York, N. Y., and Woodbourne, N. Y.:

From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne and return over the same route.

All intermediate points.

Off-route points: Points and places within 20 miles of Woodbourne.

[fol. 148] BEFORE INTERSTATE COMMERCE COMMISSION

In the matter of the application of Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a partnership, doing business as Crescent Mountain Service, Bronx, N. Y.

Docket No. MC 78980

EXCEPTIONS TO AND PETITION TO STAY ISSUANCE OF CERTIFICATE—Filed June 8, 1938

[fol. 149] Comes now the protestants, Yelloway Transportation Corporation, Eastern Capitol Lines, Inc., Flying Eagle Coach Corporation and Inter-City Transportation Co., Inc., in the above entitled proceeding, by their attorney, and respectfully except to the issuance of a certificate of convenience and necessity and specifically pray for a stay of the issuance of the same in its entirety and more particularly as follows.

I

The petitioners object to the issuance of any certificate being granted to the applicants because of the fact that on June 1st, 1935 and since that day, the applicants have not been engaged in a bona fide operation over the route applied for. They have failed to show daily and continuous operations and have failed to submit adequate proof of all the facts which go to constitute a bona fide operation in the territory involved.

II

The petitioners object to the issuance of a certificate because of the following facts which they are in a position to submit proof of if afforded the opportunity:

(a) The partnership of Herman Trevax, Jacob Vangrofsky, Murray Galley and Morris Glickman doing business as Crescent Mountain Service was not in existence and did not operate as such on or before June 1st, 1935 and during the season of 1935.

(b) That no regular route operation over the route as described was operated in the year of 1935.

(c) That no business of any kind was done by the applicant or any of its alleged partners at any time at points

between New York City and Wurtsboro, N. Y. or the so-called "points in the mountains".

(d) That the applicant or any of its alleged partners did not do any business to all of the points and places within 20 miles of Woodbourne, N. Y.

[fol. 150] (e) That the applicant or any of its alleged partners at no time operated between fixed termini.

(f) That at no time did the appellant as a partnership own or operate any motor vehicles of any type.

(g) That at no time has the applicant as a partnership paid road taxes to the State of New Jersey while allegedly operating through that State.

(h) That as a matter of fact one of the alleged partners, Jacob Vangrofsky, never paid mileage tax for the years 1935 and 1936 to the State of New Jersey.

III

The petitioners object to the issuance of a certificate on the further ground that the statements submitted in support of the application and signed by the applicant did not seek any intermediate points and that the order herein exceeds the authority applied for.

IV

The petitioners object to the issuance of a certificate on the further ground that the records of the Commission indicate that the applicants at first failed to submit sufficient proof of operation. That an order to show cause to dismiss was then served upon the applicants. That an appearance was then made by an attorney representing the applicants. That the application was referred back to the District Office and additional proof of operation by affidavits and statements were submitted and that after submission of such affidavits and statements, the order was issued herein. The said affidavits are, in the opinion of the petitioners, false and not the best evidence to submit in support of an application. That the petitioners are entitled to and seek the opportunity of rebutting and proving the falsity of the statements and affidavits submitted.

Wherefore your petitioners respectfully request that the order of June 20th, 1938, be vacated and that the applica-

tion be denied or that the order be stayed pending the assignment of the application to formal hearing to afford the petitioners an opportunity of submitting evidence in respect to the facts stated herein.

Respectfully submitted, Henry P. Goldstein, Attorney for Protestants, Yelloway Transportation Corporation, Eastern Capitol Lines, Inc., Flying Eagle Coach Corporation and Inter-City Transportation Co., Inc. 1450 Broadway, New York City.

June 6, 1938.

[fol. 151] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing exceptions upon all parties of record in the above entitled proceeding by mailing a copy thereof to each such party.

Dated, New York, June 6, 1938.

Henry P. Goldstein.

[fol. 152] Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 20th day of June, A. D. 1938.

No. MC 78980

Application of Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a Partnership, Doing Business as Crescent Mountain Service, Bronx, New York

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such

manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribing by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of the order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 153] Appendix to the Order of the Interstate Commerce Commission, Division 5, Dated the 20th Day of June, A. D. 1938

No. MC 78980

Application of Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a Partnership, Doing Business as Crescent Mountain Service, Bronx, New York

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:

Between New York, N. Y., and Woodbourne, N. Y.:

From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York highway 42 to Woodbourne, and return over the same route.

Intermediate and off-route points within 20 miles of Woodbourne.

[fol. 154] Interstate Commerce Commission, Bureau of Motor Carriers

Docket No. 78980

Public Service Interstate Transportation Company, a Corporation of the State of New Jersey, Petitioner

vs.

Crescent Mountain Service, Respondent

Petition of Protest to Granting of a Certificate as Set Forth in Compliance Order—Filed June 29, 1938

The petition of Public Service Interstate Transportation Company respectfully shows:

1. That the petitioner is a corporation of the State of New Jersey, and is a common carrier lawfully engaged in the interstate transportation of passengers by motor bus

between Bergenfield and Fort Lee, New Jersey and New York City, New York, and intermediate points, and has filed its application with the Interstate Commerce Commission for a certificate of public convenience and necessity to cover such operation, which application has been filed under Docket No. 3647.

2. That respondent is also a common carrier engaged in the interstate transportation of passengers by motor bus, between New York City, New York and Woodbourne, New York, via New Jersey.

3. That on June 20, 1938 a compliance order was issued by the Interstate Commerce Commission, Division 5, setting forth the routes over which the respondent is to receive authority for the transportation of passengers in interstate or foreign commerce.

[fol. 155] 4. That on November 29, 1937 the petitioner filed a protest against the granting of this certificate for the purpose of restricting the applicant from doing any business between New York City and points in Bergen County, New Jersey.

5. That in the description of routes attached to the above mentioned order of June 20, 1938, only State Highways are named and there is nothing to indicate that there would be a restriction on the applicant from doing business between New York City and points in Bergen County, New Jersey.

6. That protection of existing and future operators, the best interests of the industry and the proper regulation of interstate motor bus operations in the congested New York Metropolitan Area require the naming of all streets and highways to be used.

Wherefore, Petitioner prays that the entry of the order in its present form be withheld and that the effective date thereof be deferred until the order has been modified and revised to contain a street by street description of the route of applicant and a restriction on the right of applicant to do business between points in Bergen County, New Jersey and New York City, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Newark, N. J., June 24, 1938.

Public Service Interstate Transportation Company,
by Leland Taliaferro, Practitioner.

[fols. 156-157] STATE OF NEW JERSEY,
County of Essex, ss:

Leland Taliaferro, being duly sworn deposes and says: That he is the Real Estate and Tax Attorney of the Public Service Interstate Transportation Company, protestant; that he has read the foregoing petition of protest and knows the contents thereof and the the same are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things he believes them to be true.

Leland Taliaferro.

Sworn and subscribed to before me this 27th day of June, 1938. Anne M. Morris, Notary Public of New Jersey. My Commission expires July 24, 1940. (Seal.)

[fol. 158] BEFORE THE INTERSTATE COMMISSION

In the Matter of the application of HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, and MORRIS GLICKMAN, a partnership, doing business as Crescent Mountain Service, Bronx, N. Y.

Docket No. MC 78980

EXCEPTIONS TO AND PETITION TO STAY ISSUANCE OF CERTIFICATE—Filed July 2, 1938

[fol. 159] Comes now the protestants, Hudson Transit Lines and Hudson Transit Corporation in the above entitled proceeding, by their attorney, and respectfully except to the issuance of a certificate of convenience and necessity and specifically pray for a stay of the issuance of the same in its entirety and more particularly as follows.

I

The petitioners object to the issuance of any certificate being granted to the applicants because of the fact that on June 1st, 1935 and since that day, the applicants have not been engaged in a bona fide operation over the route applied for. They have failed to show daily and continuous operations and have failed to submit adequate proof of all the facts which go to constitute bone fide operation in the territory involved.

II

The petitioners object to the issuance of a certificate because of the following facts and they are in a position to submit proof if afforded the opportunity:

(a) The partnership of Herman Trevax, Jacob Vangrofsky, Murray Galley and Morris Glickman doing business as Crescent Mountain Service was not in existence and did not operate as such on or before June 1st, 1935 and during the season of 1935.

(b) That no regular route operation over the route as described was operated in the year of 1935.

(c) That no business of any kind was done by the applicant or any of its alleged partners at any time at points between New York City and Wurtsboro, N. Y. or the so-called "points in the mountains."

(d) That the applicant or any of its alleged partners did not do any business to all of the points and places within 20 miles of Woodbourne, N. Y.

(e) That the applicant or any of its alleged partners at no time operated between fixed termini.

[fol. 160] (f) That at no time did the applicant as a partnership own or operate any motor vehicle of any type.

(g) That at no time has the applicant as a partnership paid road taxes to the State of New Jersey while allegedly operating through that State.

(h) That as a matter of fact one of the alleged partners, Jacob Vangrofsky, never paid mileage tax for the years 1935 and 1936 to the State of New Jersey.

III

The petitioners object to the issuance of a certificate on the further ground that the statements submitted in support of the application and signed by the applicant did not seek any intermediate points and that the order herein exceeds the authority applied for.

IV

The petitioners object to the issuance of a certificate on the further ground that the records of the Commission in-

dicate that the applicants at first failed to submit sufficient proof of operation. That an order to show cause to dismiss was then served upon the applicants. That an appearance was then made by an attorney representing the applicants. That the application was referred back to the District Office and additional proof of operation by affidavits and statements were submitted and that after submission of such affidavits and statements, the order was issued herein. The said affidavits are, in the opinion of the petitioners, false and not the best evidence to submit in support of an application. That the petitioners are entitled to and seek the opportunity of rebutting and proving the falsity of the statements and affidavits submitted.

Wherefore your petitioners respectfully request that the corrected order of June 20th, 1938 be vacated and that the application be denied or that the order be stayed pending the assignment of the application to formal hearing to afford the petitioners an opportunity of submitting evidence in respect to the facts stated herein.

Respectfully submitted, James F. X. O'Brien, Attorney for Protestants, Hudson Transit Lines and Hudson Transit Corporation.

=17 Academy Street, Newark, New Jersey.

June 30, 1938.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing [fol. 161] exceptions upon all parties of record in the above entitled proceeding by mailing a copy thereof to each such party.

James F. X. O'Brien.

Dated, Newark, June 30, 1938.

[fol. 162] September 14, 1938.

Refer to: O-106.
Docket No. MC 78980.
Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman Dba Crescent Cadillac Lines, New York, N. Y.

Mr. Henry P. Goldstein, Attorney for Yelloway Transportation Corp., et al., 1450 Broadway, New York, N. Y.

Dear Sir:

The objections filed by you to the order issued in the above-entitled proceeding have been duly considered, and you are hereby advised that the facts set forth in support of such objections have been deemed sufficient to warrant referring this case back to the field for further investigation.

You will be contacted by our field force as to what further action will be necessary in regard to this matter.

Very truly yours, W. Y. Blanning, Director.

CC: District 2.
cc: Mr. Milton Cotton, 63 Park Row, New York, N. Y.

[fol. 163] September 14, 1938.

Refer to: O-106.
Docket No. MC-78980.
Jacob Vaingrofsky, Herman Trevax, Murray Galley and Morris Glickman Dba Crescent Cadillac Lines, New York, N. Y.

Mr. Leland Taliferro, Attorney for Public Service Interstate Trans. Co., Newark, New Jersey.

Dear Sir:

The objections filed by you to the order issued in the above-entitled proceeding have been duly considered, and you are hereby advised that the facts set forth in support of such objections have been deemed sufficient to warrant referring this case back to the field for further investigation.

You will be contacted by our field force as to what further action will be necessary in regard to this matter.

Very truly yours, W. Y. Blanning, Director.

CC: District 2.
cc: Mr. Milton Cotton, 63 Park Row, New York, N. Y.

[fol. 164] September 14, 1938.

Refer to: O-106.
Docket No. MC 78980.

Herman Trevax, Jacob Vangrofsky, Murray Galley and Morris Glickman Dba Crescent Cadillac Lines.

Mr. James F. X. O'Brien, Attorney for Hudson Transit Lines, et al., 17 Academy Street, Newark, N. J.

DEAR SIR:

The objections filed by you to the order issued in the above-entitled proceeding have been duly considered, and you are hereby advised that the facts set forth in support of such objections have been deemed sufficient to warrant referring this case back to the field for further investigation.

You will be contacted by our field force as to what further action will be necessary in regard to this matter.

Very truly yours, W. Y. Blanning, Director.

CC: District 2.
cc: Mr. Milton Cotton, 63 Park Row, New York, N. Y.

[fol. 165] October 7, 1938.

Refer to: O-106.
In re: MC 78980.
Jacob Vangrofsky, Herman Trevax, Murray Galley & Morris Glickman, d/b/a Crescent Cadillac Lines.

Mr. Leland Taliaferro, Public Service Interstate Transportation Company, Public Service Terminal, Newark, N. J.

DEAR SIR:

This will acknowledge receipt of your letter withdrawing objections to the order issued in the above-entitled case.

Very truly yours, W. Y. Blanning, Director.

District #2.
cc: Crescent Cadillac Lines, 531 E. 169th Street, Bronx, New York.

[fol. 166] C-202 Pass.

Order

Interstate Commerce Commission

No. MC-FC 14106

Application for Substitution: Crescent Express Lines, Inc., Purchaser, New York, New York, and Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a Partnership, Doing Business as Crescent Cadillac Lines, Sellers, New York, New York.

Present: John L. Rogers, Commissioner, Interstate Commerce Commission, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That application in the above entitled matter having been made in accordance with rules and regulations prescribed by the Commission under the Interstate Commerce Act, and that the proposed transaction covered thereby is not subject to the provisions of section 5 of the said act;

It further appearing, That the said Crescent Express Lines, Inc., purchaser, is fit, willing, and able properly to perform the service authorized and to conform to the provisions of the act and the requirements, rules, and regulations thereunder, in accordance with the terms of the Commission's order of June 20, 1938, in MC 78980 issued in the name of Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a partnership, doing business as Crescent Mountain Service, which trade name was subsequently changed by request to Crescent Cadillac Lines; therefore

It is ordered, That the said application be, and it is hereby, granted.

It is further ordered, That upon full compliance, within a period not to exceed thirty days from date of this order, with the requirements of sections 215, 216, and 217 of the said act, and the rules and regulations prescribed by the Commission thereunder covering the filing of common carrier rate publications and the filing and approval of evidence of security for the protection of the public, and upon filing appropriate publications providing for the cancelation of any effective rates or charges applying to trans-

portation service in excess of that herein or otherwise lawfully authorized, it shall be lawful for said purchaser to perform the motor carrier service heretofore authorized under the above-referred-to order of June 20, 1938, pending the issuance of a certificate of public convenience and necessity, unless otherwise ordered.

Dated at Washington, D. C., this 31st day of October, A. D. 1940.

By the Commission, Commissioner Rogers. W. P. Bartel, Secretary. (Seal.)

Note:- Docket No. MC 78980 has been assigned to the purchaser covering the operating rights transferred by this order.

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CONTROL UNIT 12

CHANDLER

ELLENSTEIN & O'BRIEN
COUNSELLORS AT LAW
ACADEMY BUILDING 17 ACADEMY STREET
NEWARK, N.J.
MEYER C ELLENSTEIN
JAMES F. X O'BRIEN — HAROLD J. CAVANAUGH
BENJAMIN C GURNIK
TELEPHONE MITCHELL 2-2200

June 2, 1941.

7

Interstate Commerce Commission,
Bureau of Motor Carriers,
Washington, D. C.

Att. Section of Certificates.

Gentlemen:-

Re: Crescent Express Lines, Inc.
Docket MC 78980.

JUN 3 1941

On June 20, 1938, in Docket MC 78980, a compliance order was issued to Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a partnership doing business as Crescent Mountain Service, to operate between New York City, New York, via New Jersey to Woodburn, New York, and likewise provided for intermediate and off-route points within twenty miles of Woodburn.

On July 1, 1938, on behalf of Hudson Transit Lines, protestant, I sent to the Commission twenty copies of exceptions and petition to stay, which denied that the applicant had served the territory set forth in the order, and that they had not presented proofs to justify such a broad order. Thereafter, to wit, on September 14, 1938 I received a letter from Director Blanning of the Bureau of Motor Carriers, which stated that the objections filed by me had been duly considered, and I was advised that the contents were deemed sufficient to warrant referring the case back to the field for further investigation. Thereafter contact was had with the New York office on the matter, and, as I understand it, the case was marked to be held up until the determination by the Commission in the matter of the application of Irving Nudelman, No. MC 86772. The Crescent case was that of a sedan operator conducting the same type of business set forth in the Nudelman case, and conducting the business only to certain municipalities or townships in the mountain area. The Nudelman case was decided by the Commission by decision dated February 25, 1941, but a petition to the Commission as a whole was filed and the order is therefore not yet effective.

Bureau of Motor Carriers,
Washington, D. C.

Att. Section of Certificates.

Gentlemen:-

Re: Crescent Express Lines, Inc.
Docket MC 78980.

JUN 3 1941

On June 20, 1938, in Docket MC 78980, a compliance order was issued to Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a partnership doing business as Crescent Mountain Service, to operate between New York City, New York, via New Jersey to Woodburn, New York, and likewise provided for intermediate and off-route points within twenty miles of Woodburn.

On July 1, 1938, in behalf of Hudson Transit Lines, protestant, I sent to the Commission twenty copies of exceptions and petition to stay, which denied that the applicant had served the territory set forth in the order, and that they had not presented proofs to justify such a broad order. Thereafter, to wit, on September 14, 1938 I received a letter from Director Blanning of the Bureau of Motor Carriers, which stated that the objections filed by me had been duly considered, and I was advised that the contents were deemed sufficient to warrant referring the case back to the field for further investigation. Thereafter contact was had with the New York office on the matter, and, as I understand it, the case was marked to be held up until the determination by the Commission in the matter of the application of Irving Nudelman, No. MC 86772. The Crescent case was that of a sedan operator conducting the same type of business set forth in the Nudelman case, and conducting the business only to certain municipalities or townships in the mountain area. The Nudelman case was decided by the Commission by decision dated February 25, 1941, but a petition to the Commission as a whole was filed and the order is therefore not yet effective.

It must be noted that the compliance order issued June 1938 contained no adequate and proper description of the type of service operated, and worse than this followed the customary language by specifying a regular route and fixed termini, none of which was justified by the operations in question, and which apparently resulted from the fact that the Commission had not yet handed down either the Sullivan decision or the Nudelman decision above mentioned. Likewise, instead of limiting the operator to the areas previously served by him, it gave the operator a blanket twenty miles for intermediate and off-route points from Woodburn. In both of the respects above mentioned, the order is in direct contradiction of the Commission's decision in the Nudelman case above cited, which both fully described the type of operation and specified the areas to be served. The type of operation in the instant case is and has been no different than the type described in the Nudelman case.

It appears that the above mentioned operation has also been known as Crescent Mountain Lines, and that a short time ago there was a substitution to a corporation called Crescent Express Lines.

The president of Hudson Transit Lines, Mr. D. Clinton Dominick, and the treasurer of another operator in the area, to wit, Mr. Theodore J. Richmond, of Mountain Transit Corp., were informed on Wednesday, May 28th, by Mr. Benjamin Casser, who controls Manhattan Coach Lines, Westwood Transportation Company, and Lincoln Lines, that he now controls Crescent Express Lines, formerly the Crescent Mountain Service. He also called their attention to something not theretofore known by them, to wit, that in April Crescent had filed a new tariff effective June 1st, which cut the rates of the other operators in the area. He then gave them their choice of going through a rate war this summer, or withdrawing protests to the Royal Cadillac Service, which he admitted he has controlled and does control, and also withdrawing protests against the issuance of the certificate to Crescent Express Lines, formerly Crescent Mountain Service. He likewise informed them that he was going to operate buses on regular route, which had never been done by Crescent before, and they have also ascertained that Crescent has made application for the first time to New York City for a regular bus route through the City. This may be confirmed by Lieutenant McGarvey of the New York City Police Department.

Mr. Casser, who controls Manhattan, Westwood and Lincoln Lines, large operators, has competed unlawfully and improperly with the regular route operators by the use of some one of these mountain sedan operations for a number of seasons past, and although he has controlled Royal Cadillac Service and Reliable Cadillac Lines, and now Crescent Express Lines, no applications were ever made for acquisition of such control and management. As a very large operator, whose business on his main operations drops off in the summer, he has been able through these subterfuges to pour a large number of buses in direct competition during the summer months with the regular operators, such as Hudson Transit Lines, who maintain a dependable service throughout the year, and who must look to the summer for revenues to make up losses incurred in winter operation. The regular operators are weary with the losses they have sustained through these improper tactics, and my client is justly incensed at being placed in the position of having this new competition and possible rate war included by reason of his justifiable refusal to be browbeaten into withdrawing protest against this operation not entitled to what Mr. Casser, who now controls it, desires.

Wednesday, May 28th, by Mr. Benjamin Casser, who controls Manhattan Coach Lines, Westwood Transportation Company, and Lincoln Lines, that he now controls Crescent Express Lines, formerly the Crescent Mountain Service. He also called their attention to something not theretofore known by them, to wit, that in April Crescent had filed a new tariff effective June 1st, which cut the rates of the other operators in the area. He then gave them their choice of going through a rate war this summer, or withdrawing protests to the Royal Cadillac Service, which he admitted he has controlled and does control, and also withdrawing protests against the issuance of the certificate to Crescent Express Lines, formerly Crescent Mountain Service. He likewise informed them that he was going to operate buses on regular route, which had never been done by Crescent before, and they have also ascertained that Crescent has made application for the first time to New York City for a regular bus route through the City. This may be confirmed by Lieutenant McGarvey of the New York City Police Department.

Mr. Casser, who controls Manhattan, Westwood and Lincoln Lines, large operators, has competed unlawfully and improperly with the regular route operators by the use of some one of these mountain sedan operations for a number of seasons past, and although he has controlled Royal Cadillac Service and Reliable Cadillac Lines; and now Crescent Express Lines, no applications were ever made for acquisition of such control and management. As a very large operator, whose business on his main operations drops off in the summer, he has been able through these subterfuges to pour a large number of buses in direct competition during the summer months with the regular operators, such as Hudson Transit Lines, who maintain a dependable service throughout the year, and who must look to the summer for revenues to make up losses incurred in winter operation. The regular operators are weary with the losses they have sustained through these improper tactics, and my client is justly incensed at being placed in the position of having this new competition and possible rate war included by reason of his justifiable refusal to be browbeaten into withdrawing protest against this operation not entitled to what Mr. Casser, who now controls it, desires.

This lengthy letter is written in the hope that the Commission may take some immediate action to put an end to the tactics engaged in by Mr. Casser.

The Crescent file is now in Washington with the Section of Certificates.

INTERSTATE COMMERCE COMMISSION
JUN 3 1941
SECTION OF CERTIFICATES

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While the Nudelman decision is not effective, since a petition for reconsideration by the whole Commission has been filed, none the less the Commission, by Division 5, has spoken, and there is no reason why the compliance order heretofore granted should not be immediately set aside, and a new compliance order issued, which will fully describe the service along the lines of the Nudelman decision made by the Commission (Division 5) on February 25, 1941, Docket No. MC 86772, and at the same time in that order describe the areas which may be served by Crescent, in accordance with the proof submitted by them and contained in the docket.

If this can be done immediately, the regular operators will be spared the unfair competition with resultant losses.

I will greatly appreciate as prompt action as you can possibly give to this matter in order to prevent a continuance of the injustice resulting from the tactics used.

Yours very truly,

James F. X. O'Brien

James F. X. O'Brien,
Attorney for Hudson Transit Lines.

OB:HD

[fol. 170] Order C-2

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 2nd day of September, A. D. 1941.

No. MC 78980

Application of Crescent Express Lines, Inc., New York, New York

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity upon compliance with the terms of the said order; that protests or exceptions to said order having been duly filed; and further consideration having been had;

It further appearing, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Interstate Commerce Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, and upon filing appropriate publications providing for the cancelation of any effective rates or charges applying to transportation service in excess of that herein or otherwise lawfully authorized, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is

otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificates, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

(Seal.) W. P. Bartel, Secretary.

[fols. 171-172] C-2

Appendix to the order of the Interstate Commerce Commission, Division 5, dated the 2nd day of September, A. D. 1941.

No. MC 78980

Application of Crescent Express Lines, Inc., New York, New York

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not

including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

[fol. 173] BEFORE THE INTERSTATE COMMERCE COMMISSION

MC-78980

In the Matter of CRESCENT EXPRESS LINES, INC.

PROTEST OF CRESCENT EXPRESS LINES, INC., AND PETITION TO STAY ISSUANCE OF CERTIFICATE IN THE WITHIN MATTER—Filed October 10, 1941.

Comes now Crescent Express Lines, Inc., the applicant in the above entitled proceeding, by George H. Rosen, its attorney, and respectfully protests to the issuance of a certificate in the within matter and for a stay of the issuance thereof upon the grounds more particularly set forth as follows:

1. This protest is filed in opposition to the compliance order dated September 2, 1941.

2. The record herein warranted the compliance order of June 20, 1938, issued to the applicant in the above matter and which provided as follows:

Appendix to the order of the
Interstate Commerce Commission Div. 5
Dated the 20th day of June 1938
No. MC 78980

The service to be rendered by applicant as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regu-

lar route, between fixed termini, and to and from [fol. 174] intermediate and off-route points, during the season extending from the 1st of June to the 1st of Oct. inclusive, is as specified below.

Between New York and Woodbourne, N. Y.

From N. Y. over G. W. bridge to Fort Lee, N. J. thence over N. J. Highway 4 to Bergenfield, N. J. thence over N. J. Highway 2 to the N. J. N. Y. State line; thence over N. Y. Highway 17 to Monticello N. Y. and thence over N. Y. Highway 42 to Woodbourne and return over the same route.

Intermediate and off route points within 20 miles of Woodbourne.

3. The vacating and setting aside of the said order by the new compliance order of September 2, 1941, was without any evidence or procedure to sustain such action.

4. The issuance of said compliance order dated September 2, 1941, is without any evidence to sustain it, and no proof of any kind exists to justify the restrictions contained therein to direct non-scheduled, door-to-door operations over irregular routes with vehicles having only six (6) passengers besides the driver.

5. The Interstate Commerce Commission is without authority of law to restrict the right of any carrier to add to its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate as the development of the business and the demands of the public shall require; and the issuance of the said order dated September 2, 1941, restricting the carrier herein to vehicles having a seating capacity of only six passengers besides the driver and children under ten years of age is [fol. 175] contrary to the provisions of the Motor Carrier Act of 1935, the Transportation Act of 1940, and the amendments thereof.

6. There are no findings of fact or conclusions of law pursuant to the statute and rules in such case made and provided to justify or sustain the said compliance order dated September 2, 1941.

7. The said compliance order dated September 2, 1941 should be vacated and set aside, and the compliance order of June 20, 1938 reinstated.

Wherefore, protestant Crescent Express Lines, Inc., respectfully prays that the compliance order dated September 2, 1941, be vacated and set aside and that the issuance of a certificate herein be stayed pending further investigation and order of the Commission.

Dated: New York, N. Y., October 7, 1941.

Respectfully submitted, George H. Rosen, Attorney for Crescent Express Lines, Inc., Office and P. O. Address, 302 Broadway, Borough of Manhattan, City of New York.

[fol. 176] BEFORE THE INTERSTATE COMMERCE COMMISSION

MC-78980

In the Matter of CRESCENT EXPRESS LINES, INC.

BRIEF IN SUPPORT OF PROTEST OF CRESCENT EXPRESS LINES, INC., TO ISSUANCE OF CERTIFICATE PURSUANT TO COMPLIANCE ORDER DATED SEPTEMBER 2, 1941

The compliance order of September 2, 1941 was issued without notice despite the existence of a previous compliance order dated June 20, 1938. The applicant, Crescent Express Lines, Inc., respectfully objects to the new compliance order by reason of the fact that it changes the content of the previous compliance order so as to direct a non-scheduled, door-to-door service over irregular routes with vehicles having six passengers besides the driver.

The Real Issue Is Whether the Commission Has the Right to Restrict a Carrier to Vehicles of the Sedan Type

In the Nudelman case, MC-86772, decided February 25, 1941, the Commission set forth the principle that a carrier could be restricted to a vehicle of the sedan type having a seating capacity of not more than six passengers besides [fol. 177] the driver. Commissioner Lee dissented. This ruling and dissent were followed in subsequent cases.

Section 203, Subdivision 13, defines a motor vehicle as follows:

"(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or

drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 208 (a) provides as follows:

"Any certificate issued under section 206 or 207 shall specify * * *: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

In view of the decision in the Nudelman case there is no need to set forth the matter any further except to protect applicant's position in this matter.

It is also respectfully submitted that the change in the form of the order from that contained in the order of June 20, 1938 is not supported by any evidence or procedure whatsoever.

[fols. 178-179] CONCLUSION

The order of September 2, 1941 should be vacated and set aside and the order of June 20, 1938 should be reinstated, and that all proceedings for the issuance of a certificate pursuant to the said order of September 2, 1941, should be withheld.

Dated: New York, N. Y., October 7, 1941.

Respectfully submitted, George H. Rosen, Attorney for Crescent Express Lines, Inc., Office and P. O. Address, 302 Broadway, Borough of Manhattan, City of New York.

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of October, 1941, served a copy of the foregoing protest and brief on all parties of record by mailing a copy thereof postage prepaid.

George H. Rosen.

[fol. 180] BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of The Application of CRESCENT EXPRESS LINES, INC.

Docket No. MC-78980

REPLY TO "PROTEST OF CRESCENT EXPRESS LINES INC. AND PETITION TO STAY ISSUANCE OF CERTIFICATE"—Filed Oct. 17, 1941

Comes now Mountain Transit Corporation, protestant in the above proceedings, by its attorney and respectfully replies to the protest and petition herein and prays that the same be denied and in support thereof states as follows:

Applicant's predecessors filed a Grandfather application which was referred to a District Supervisor in New York City for informal conference sometime prior to May 1st, 1938. None of the bus operators in the territory were advised of this conference and this Commission, in accordance with documentary evidence and proof submitted by the said applicant's predecessors and upon statements in a questionnaire, issued a compliance order dated May 7th, 1938, which was subsequently succeeded by a compliance order [fol. 181] dated June 20th, 1938. This compliance order has been set out in the protest herein, paragraph "2".

Protestants, who were predecessors to Mountain Transit Corporation, and Inter-City Transportation Co. Inc., filed Exceptions to the order of June 20th, 1938. The applicant's predecessors did not file any Exceptions thereto, obviously being satisfied with whatever legal determination the Commission would make upon the facts and evidence submitted. After the filing of Exceptions on or about June 6th, 1938, D. V. Grant, District Supervisor, addressed a letter on October 31st, 1938, to the applicant's predecessors advising them:

> "Upon specific complaint, the finding made by this Commission in the matter of your 'grandfather' rights has been stayed and the application returned to me for further informal investigation and report."

They were requested to be present on December 1st, 1938, at which time protestants were also present.

At the informal conference on December 1st, 1938, no additional data was submitted over and above that originally given to the Examiner and that data consisted of evidence of sedan movements over irregular routes in a door-to-door service, between points in New York City, on the one hand, and specific points in Sullivan and Ulster Counties, on the other. The data and proof submitted to the Commission at the informal conferences indicated that applicant's predecessors operated sedans in an irregular, seasonal, non-scheduled, door-to-door service.

In a series of cases involving similar facts, entitled *Irving Nudelman, Common Carrier, MC-86772 et als.*, this Commission had pending the question as to whether the applicants [fol. 182] in their type of service were engaged in special operations or in a regular route common carrier service. Final determination has been made in *22 M. C. C. 275* and upon report of the Commission on reconsideration decided February 25th, 1941, they find that applicants therein, engaged in the type of service as described, were entitled to certificates of convenience and necessity to engage in special seasonal operations as common carriers by motor vehicles of passengers and their baggage, between May 15 and September 30th, both inclusive, between points in New York, N. Y. and certain specific points in Sullivan and Ulster Counties, N. Y., over irregular routes through New Jersey in a non-scheduled, door-to-door service, limited to the transportation of not more than six passengers in any one vehicle but not including the driver thereof and not including children under ten years of age who did not occupy a seat or seats.

Accordingly, this Commission on September 2nd, 1941, ordered that the order of June 20th, 1938 herein, be set aside and that a certificate be issued for service to be rendered as a common carrier by motor vehicle of passengers and their baggage in special operations as described in the *Nudelman* case between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

The petitioner's brief states:

"The Real Issue Is Whether The Commission Has The Right To Restrict A Carrier To Vehicles Of The Sedan Type."

[fol. 183] If that is the only issue, the same has already been determined in the *Nudelman* case* and accordingly the petition should be denied and the order of September 2nd, 1941, should be continued in force and effect as properly describing the legal authority to which the applicant is entitled upon the facts of operation submitted by them to this Commission.

In addition to the aforementioned, it is pointed out that the applicant does not make claim that there is any additional evidence or facts to be submitted but that the same already are in possession of the Commission and that in its opinion those facts would entitle the applicant to the form of authority as described originally in the order of June 20th, 1938. In other words, applicant merely differs as a matter of law upon the admitted facts of operation and it is therefore respectfully reiterated and urged that the determination made herein is proper and that the petition should be denied.

Dated, New York, N. Y., October 16th, 1941.

Respectfully submitted, Henry P. Goldstein, Practitioner and Attorney.

[fols. 184-185] CERTIFICATE OF SERVICE

I do hereby certify that there has, on this 16th day of October, 1941, been served a copy of the foregoing Reply upon all parties of record to this proceeding.

(S) Henry P. Goldstein.

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* The Nudelman determination has since been followed in other types of motor bus cases. See Harry Benson 29 M. C. C. 603.

[fol. 186] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 78980

In the Matter
of
The Application of Crescent Express Lines, Inc.,
New York, New York

REPLY OF PROTESTANT, HUDSON TRANSIT LINES, INC. TO PROTEST OF CRESCENT EXPRESS LINES, AND ITS PETITION TO STAY ISSUANCE OF CERTIFICATE—Filed Oct. 18, 1941.

Statement of Facts and Argument

On September 2, 1941, a compliance order was entered by the Commission giving to Crescent Express Lines the right to carry passengers in interstate commerce in special, non-scheduled, door to door service, limiting the transportation to not more than six passengers in any one vehicle, excluding the driver and small children, and covering the season, June 1st to October 1st, and over irregular routes, covering the territory of New York, New York, on the one hand, and points and places in all of Sullivan County, and in specified townships of Ulster County, New York, on the other hand.

This order is protested by the applicant, which asks that it be set aside, that the compliance order of June 20, 1938 be reinstated, and that the Commission withhold ac-
[fol. 187] tion in issuing certificate on the compliance order of September 2, 1941.

The reasons for the protest, while listed as seven in number, actually consist of two points or claims.

One claim, covered by protests 1, 2, 3, 4, 6 and 7 is that there was no evidence before the Commission to warrant the issuance of the Septembr 2, 1941 compliance order in lieu of the June 20, 1938 compliance order.

The other claim set forth in protest No. 5 is that the Commission has not the power to define the special service permitted, as it did in the September 2, 1941 compliance order.

If the Commission will but review the docket in the instant case, it will find that an application under Form BMC A was filed by Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a partnership, d/b/a Crescent Mountain Service, Bronx, New York.

The June 20, 1938 compliance order was issued to that partnership. Later, there was a substitution of Crescent Express Lines, Inc. as applicant, in lieu of the partnership. Still later, and in July of this year, an application was filed under Form BMC 45 by Mohawk Lines, Inc. MC-F-1607 seeking to acquire control by purchase of Crescent Express Lines, Inc.

Mohawk Coach Lines is a company controlled by Benjamin Casser, who is also the president, director and stockholder of Manhattan Transit Company, Manhattan Coach Lines, Inc., Westwood Transportation Company, Westwood Transportation Lines, Inc. Lincoln Transit Co. Inc., Atlantic Coach Lines, Inc., and Consolidated Bus Terminal, Inc.

George H. Rosen, the attorney for Mr. Casser's Mohawk Lines, Inc. is also the attorney protesting against the compliance order issued September 2, 1941.

[fol. 188] The acquisition case was set for hearing September 4, 1941, before Examiner Higgins, but upon the applicant being informed of the compliance order handed down September 2, 1941, an insistent request was made for adjournment and the matter was put off without date.

It appears that this large bus operator, using Mohawk Lines, Inc., and being represented by Mr. Rosen, is seeking to in some way or other get a regular route operation between fixed termini to compete with existing facilities, and has attempted to effect that purpose through the acquisition of this special operator.

The actual protest and petition in the name of the applicant, Crescent, would appear to be that of Mr. Casser's Mohawk Lines, which thought that in acquiring Crescent it could effect its purpose of improperly competing with bona fide existing regular route operators.

The contention of Crescent that the evidence warrants the compliance order of June 20, 1938, and does not warrant the corrected compliance order of September 2, 1941 is wholly without basis.

The records in the official docket disclose that on February 12, 1936, the partnership, Crescent, filed an application under form BMC A, and on March 26, 1937, it filed a BMC A-2 application, in which it set forth the type of operation conducted by it, and even did more than this, to wit, it indicated that because of this type of operation it believed it was exempt from the provisions of the Motor Carrier

Act, 1935. Reference to the application BMC A-2, filed as above mentioned, indicates this statement by the applicant:

> "And applicant further reserves the right to claim exemption from any and all provisions of the Motor [fol. 189] Carrier Act, 1935, and the filing of this application shall not be deemed a waiver of applicant's rights."

In the supplemental Exhibit A, applicant alleged that it went from New York City by way of the George Washington Bridge to Suffern and to Wurtsboro—

> "where traffic is distributed to the summer resorts within a radius of twenty miles from Woodbourne, New York."

Annexed to the application was a map showing the New York area and the way that applicant travelled to the mountain resort area, and indicated on that map a large irregular circle as the area served by it, which was an area having an approximate twenty mile radius from Woodbourne, New York. This map, which was part of the application, indicated a *territory served*, and did not indicate a route or routes between fixed termini in that area.

Attached to exhibits in the docket was a card submitted by the applicant which reads as follows:

"7 Passenger Cars
Leaving Daily to All Parts of the Mountains
At Lowest Rates
(a number of places were listed)
From Your Home to Your Hotel
Boarding and Rooming Accommodations if desired.
Please Call to See Us At Our Residence
About Reservations
Crescent Mountain Service
531 East 169th Street."

The docket also disclosed protests to the application by a number of protestants, including Hudson Transit Lines, [fol. 190] and disclosed that in the beginning of 1938, the Commission questioned the applicant's right to operate by show cause orders, and that the applicant submitted a number of affidavits describing his operations, their type, necessity, etc. Excerpts from some of these affidavits will

be here set forth, indicating the type of operation conducted by applicant, Crescent Mountain Service.

Affidavit of Rubin Fried, subscribed and sworn January 10, 1938, among other things said:

> "The reason for their service is that they transport people to hotels located in all roads and by-roads, obviating the necessity of their passengers having to use foot or other extraordinary means to get to their actual destination."

In the affidavit of Harry K. Cohen, who had a hotel at Woodbourne, subscribed and sworn, January 10, 1938, it was stated among other things:

> "I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service, since May, 1932. Their business has been the transportation of guests of mine from New York City to my hotel, and from my hotel to New York City."

The affidavit of Moe Bail, subscribed and sworn January 10, 1938, and residing at Woodborne, New York, in referring to the applicants, stated:

> "We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City. * * * I have also been transported by them from my hotel to New York City. During my [fol. 191] passage, I noticed that they picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City."

The affidavit of Izzy F. Feldman, a hotel owner of Woodridge, New York, sworn and subscribed January 10, 1938, stated among other things, in referring to the applicants:

> "They operate seven passenger sedans and carry passengers to and from summer hotels located in Sullivan and Ulster Counties. * * * The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of transportation to and from my hotel since 1932. * * * I sincerely believe that their mode of transportation is extremely necessary and convenient for my own and my guests' needs."

The affidavit of Israel Levine, whose store the applicants used at 531 East 169th Street, New York City, subscribed and sworn January 14, 1938, among other things, in referring to the applicants, stated:

> "I have personally seen them aranging for said trips with passengers."

The affidavit of Adela Dingenthal of the Bronx, subscribed and sworn January 14, 1938, among other things, said:

> "In the summer of 1933 and 1934, I hired the aforesaid persons (referring to the applicants) to transport me and my family from their office to Accord in the County of Ulster. * * * My family and I have personally found that this method of transportation is [fol. 192] most convenient, and the most economical for our purpose."

The affidavit of Edna Livingston of the Bronx, subscribed and sworn January 14, 1938, stated that she had hired the car of applicants to take herself and her family from applicant's office in New York City to North Branch in Sullivan County, and said:

> "Riding with us at the times that we were transported to North Branch, New York, by the aforementioned Crescent Mountain Service, were other passengers who were transported to other points in Sullivan and Ulster Counties. I specifically remember other pasengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake."
>
> (Note: A reference to the map will disclose that the operator serving all of these points in the one car was obviously operating over irregular routes and not between fixed termini.)

In the affidavit of Harry Trevax, the father of the applicant, Herman Trevax, sworn and subscribed January 14, 1938, he told how his son had started the business with the other applicants joining in with him, and how he had helped his son, and showed the type of business they carried on when he stated:

> "My wife and I helped him out by answering phone calls and booking work."

It is most important to note that when the Crescent's right to operate was questioned in the beginning of 1938, the applicant brought everything it could, such as diaries showing the reservations for passengers, and all of the [fol. 193] aforesaid affidavits to prove its right to operate, by showing that it had been in operation. It made no claim at that time to any regular route, but merely sought to carry on the business it always had done. Even though it brought everything it could, no attempt was made to produce, and the record shows there was not produced any schedules of operation, such as a regular route operator would have had, and no tickets or ticket sale books, and no advertisements other than the throw-aways indicating the special door to door service, which advertised that it would take people from their home to their hotel. *These proofs clearly disclose that the applicant was not a scheduled operator on regular route between fixed termini, but was a special operator engaged in special operations, territorial in scope, and over irregular routes in unscheduled service, operated with seven passenger sedans.*

After this proof was submitted in the beginning of 1938, the Commission issued a compliance order, dated June 20, 1938, which purported to give to applicant the right to continue the business which he had done, but which erroneously gave him a regular route operation. This was because the Commission had not yet passed upon the many cases involving this question, and the *Nudelman* decision, MC 86772, 22 M. C. C. 275, had not of course been handed down.

Immediately after the issuance of this compliance order, protestants, including Hudson Transit, objected and filed protest, claiming that no regular route operation had ever been run by Crescent. The result of this protest was a letter, as shown by the docket, dated September 14, 1938, addressed to James F. X. O'Brien, Attorney for Hudson Transit Lines, referring to O-106, Docket MC 78980, Her- [fol. 194] man Trevax, etc. d/b/a Crescent, in which Director Blanning stated as follows:

> "The objections filed by you to the order issued in the above entitled proceeding have been duly considered, and you are hereby advised that the facts set forth in support of such objections have been deemed sufficient to warrant referring this case back to the field for further investigation."

The matter was then held up until the questions of law were settled by the Commission as a whole in the *Nudelman* case. These were finally settled when the Commission as a whole, on petition for reconsideration to it, rejected the petition and affirmed the action of the Commission by Division 5 in its determination and decision of the *Nudelman* case, 22 M. C. C. 275. Then the Commission merely proceeded to apply to the facts already in its possession, some of which have been set forth in this brief, the law determined in the *Nudelman* case, with the result that it handed down the compliance order of September 2, 1941, definitely and properly defining the special type of service which Crescent had done, and which it was entitled to continue to do. The Commission further carried out its duty by specifying the territory at each end which could be served by this special operation, and instead of leaving a vague twenty mile radius from Woodbourne, specified the places served by the applicant, which, incidentally, upon examination cover practically all of the townships within a radius of twenty miles from Woodbourne.

If Crescent had not sold its operations to the large operator above mentioned, it would undoubtedly have been content to continue with the type of operation always theretofore conducted by it. This large operator, however, is looking not for a special type operation but for a regular route [fol. 195] operation between fixed termini, which he can use to compete with present bona fide existing facilities and take away from them a large part of their revenues during the summer time, when that large operator has a great many buses at his disposal due to a seasonal slack in his main operating lines.

The contention that there was no basis for the 1941 compliance order and that there was for the 1938 compliance order is clearly shown to be erroneous by reference to the facts above mentioned, contained in the official docket. The applicant's own statements clearly show that the only proper compliance order which could be issued is the order which was issued on September 2, 1941.

Hudson Transit Lines will not here argue the right of the Commission to properly define the special type of service rendered.

The contentions in the Crescent's protest and petition for stay are merely a part of the many questions which were raised and passed upon by the Commission in the

Nudelman case. That case has been heard and passed upon by the Commission as a whole. It is the law which must be applied to the undisputed facts disclosed by examination of the docket herein.

Hudson Transit Lines respectfully alleges that the petition to stay the issuance of a certificate under the compliance order of September 2, 1941, is merely an attempt on the part of Crescent and Mohawk Lines to continue an illegal attempt to compete with and take away the business of Hudson Transit Lines and the other bona fide operators serving the territory on regular route between fixed termini.

We respectfully request the Commission to immediately reject the protest and petition of Crescent, and to end this litigation by the issuance of a certificate defining the rights of Crescent in the manner set forth in the September 2, [fol. 196] 1941 compliance order to the end that it may be prevented from unlawfully invading our field of operation to the detriment and loss of Hudson Transit Lines.

Respectfully submitted, (S.) James F. X. O'Brien,
Attorney for Protestant, Hudson Transit Lines.

CERTIFICATE OF SERVICE

I do certify that on October 18, 1941, a copy of the foregoing Reply was served upon the attorneys for all parties of record in the within matter.

James F. X. O'Brien.

[fols. 197-198] ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 17th day of March, A. D. 1942.

No. MC 78980

Application of Crescent Express Lines, Inc., New York, New York

This proceeding coming on for further consideration:

It appearing, That a petition has been filed by applicant objecting to the order of September 2, 1941, issued herein; and further consideration having been had, and good cause appearing therefor;

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 199] BEFORE THE INTERSTATE COMMERCE COMMISSION

MC-78980

In the Matter of CRESCENT EXPRESS LINES, INC.

PETITION ON BEHALF OF APPLICANT, CRESCENT EXPRESS LINES, INC., FOR RECONSIDERATION BY THE ENTIRE COMMISSION AND/OR TO REOPEN AND GRANT A HEARING IN THE WITHIN MATTER—Filed April 6, 1942

Comes now Crescent Express Lines, Inc., the applicant in the above entitled proceeding and files this, its petition for reconsideration by the entire Commission of the decision of Division 5, under date of March 17, 1942 and prays that a hearing be directed herein; and in support of the said petition respectfully shows:

1. That heretofore this Commission issued its compliance order dated June 20, 1938, to the applicant in the above matter which provided as follows:

Appendix to the order of the Interstate Commerce Commission Div. 5 Dated the 20th day of June 1938

No. MC 78980

The service to be rendered by applicant as authorized by the order of which this is a part, in interstate or [fol. 200] foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of Oct. inclusive, is as specified below.

Between New York and Woodbourne, N. Y.

From N. Y. over G. W. bridge to Fort Lee, N. J. thence over N. J. Highway 4 to Bergenfield, N. J. thence over N. J. Highway 2 to the N. J. N. Y. State line; thence over N. Y. Highway 17 to Monticello, N. Y. and thence over N. Y. Highway 42 to Woodbourne and return over the same route.

Intermediate and off route points within 20 miles of Woodbourne.

2. That the said compliance order was vacated and set aside by this Commission and a new compliance order dated September 2, 1941, was issued without any other or additional evidence or procedure to support or sustain said action. That no hearings to support the new compliance order were had, and there was no evidence taken to support the change in the compliance order previously issued on June 20, 1938. The only evidence in the record is that taken at the *ex parte* hearing which was sufficient to support the compliance order of June 20, 1938 or the same would not have been made.

3. The issuance of the said compliance order dated September 2, 1941 is not sustained by any evidence, and the [fol. 201] restrictions therein contained restricting the applicant to non-scheduled, door-to-door operations over irregular routes with vehicles having only six (6) passengers besides the driver is contrary to the statute in such case made and provided. No provision in the new compliance order is made for passengers who wish to take vehicles of the applicant at terminals and who do not care to go beyond applicant's terminals at the other end of the line. There is nothing to support the restriction to door-to-door operations in the record because there were no public hearings in this matter.

The Commission has no authority to restrict a carrier to scheduled or non-scheduled operations. There is no provision in the statute itself that justifies the Commission to insert a restriction as to schedules. The only time the question of schedules might be restricted is in the case of a charter operation where the entire vehicle is chartered for a particular trip, but where as here the carrier is classified as a common carrier transporting individual passengers in a vehicle, not wholly chartered by such passengers, such a restriction as to schedules is outside the provisions of the statute itself. Applicant wishes to call the Commission's attention to the said "non-scheduled" restriction contained in the order. This is not a description of what applicant is authorized to do but is a negative description of what the order directs should not be done. Negative provisions are not in accordance with the statute, and therefore, the said provision should be eliminated.

The inclusion of the restriction "door-to-door" as stated above is not supported by any evidence, but even if it were, [fol. 202] the said order is not broad enough in that no provision is contained therein for passengers who wish to board applicant's vehicles at terminals and who wish to be transported to terminals. This carriage is less than so-called door-to-door operations and provision should be made therefor. This service was covered by the compliance order of June 20, 1938 and is supported by the evidence on which it was based. Applicant is entitled to its rights as set forth in said order of June 20, 1938 and is entitled to reinstatement of the said order.

The restriction as to sedans is the real subject of the order and should be eliminated for the reasons hereinafter set forth.

4. The Interstate Commerce Commission is without authority of law to restrict the right of any carrier to add to its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate as the development of the business and the demands of the public shall require; and the issuance of the said order dated September 2, 1941, restricting the carrier herein to vehicles having a seating capacity of only six passengers besides the driver and children under ten years of age is contrary to the provisions of the Motor Carrier Act of 1935, the Transportation Act of 1940, and the amendments thereof.

The Real Issue Is Whether the Commission Has the Right to Restrict a Carrier to Vehicles of the Sedan Type

In the *Nudelman* case, MC-86772, decided February 25, 1941, the Commission set forth the principle that a carrier [fol. 203] could be restricted to a vehicle of the sedan type having a seating capacity of not more than six passengers besides the driver. Commissioner Lee dissented. This ruling and dissent were followed in subsequent cases.

Section 203, Subdivision 13, defines a motor vehicle as follows:

> "(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property,

but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 208 (a) provides as follows:

"Any certificate issued under sections 206 or 207 shall specify * * *: *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

In view of the decision in the *Nudelman* case there is no need to set forth the matter any further except to protect applicant's position in this matter.

[fol. 204] It is also respectfully submitted that the change in the form of the order from that contained in the order of June 20, 1938 is not supported by any evidence or procedure whatsoever.

The Commission has no authority to freeze a carrier to its status as of June 1, 1935. See *United States of America and Interstate Commerce Commission* v. *Carolina Freight Carrier's Corp.*, 86 L. Ed. 627; *Howard Hall, Inc.* v. *United States of America*, 86 L. Ed. 639. This is particularly true of freezing a carrier to the type of vehicles it used on June 1, 1935. See *Section 208 (a) supra.*

5. There are no findings of fact or conclusions of law pursuant to the statute and rules in such case made and provided to justify or sustain the said compliance order dated September 2, 1941, and could not make such findings because there was no new evidence taken.

6. The said compliance order dated September 2, 1941 should be vacated and set aside, and the compliance order of June 20, 1938 reinstated.

[fols. 205-207] CONCLUSION

The order of September 2, 1941 should be vacated and set aside and the order of June 20, 1938 should be reinstated, and that all proceedings for the issuance of a certificate pursuant to the said order of September 2, 1941, should be

withheld; or in the alternative that a public hearing be ordered herein.

Dated: New York, N. Y., April 3, 1942.

Respectfully submitted, (S.) George Rosen, Attorney for Crescent Express Lines, Inc., Office & P. O. Address, 302 Broadway, Borough of Manhattan, City of New York.

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of April, 1942, served a copy of the foregoing petition on all parties of record by mailing a copy thereof postage prepaid.

George H. Rosen.

[fol. 208] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC 78980

In the Matter of The Application of CRESCENT EXPRESS LINES, INC., New York, New York

REPLY OF PROTESTANT, HUDSON TRANSIT LINES, INC. TO PETITION OF CRESCENT EXPRESS LINES, INC. FOR RECONSIDERATION BY THE ENTIRE COMMISSION—Filed April 13, 1942

Statement

The petitioner, Crescent Express Lines, Inc. by petition dated April 3, 1942 appealed to the Commission as a whole seeking reconsideration of a previous petition addressed to Division 5, wherein it sought to set aside a compliance order issued September 2, 1941 to applicant, and reinstate a previous compliance order of June 20, 1938 issued to applicant, or, in the alternative, grant a hearing thereon.

The application actually is an attempt on the part of the applicant, who, by its compliance order, is limited to an irregular route, nonscheduled, door to door service, limited to the transportation of not more than six passengers in any one vehicle, to find some excuse to operate in a manner different from that authorized, and different from that operated on the Grandfather date.

[fol. 209] It is an attempt to obtain the setting aside of the September 2, 1941 compliance order in order to then il-

legally operate over regular route and between fixed termini, in competition with lawful regular route operators despite the fact that applicant on the Grandfather date and thereafter was an irregular route, door to door sedan livery operator.

The petition alleges that as a matter of fact there is nothing before the Commission to support the definition of its Grandfather operations as contained in the September 2, 1941 compliance order, and secondly that aside from the facts, as a matter of law, the Commission had no right to so define its Grandfather operations, and thus limit its right to operate to operations similar to those conducted on the Grandfather date. Both of these contentions are without merit.

In addition to the facts contained in the record under Docket MC 78980, it is interesting to note that in July, 1941, an application was filed under Form BMC 45 by Mohawk Lines, Inc. seeking to acquire control by purchase of Crescent Express Lines, Inc. under Docket No. MC-F 1607.

Mohawk Lines is a company controlled by Benjamin Casser, who is also the president, director and stockholder of Manhattan Transit Co., Manhattan Coach Lines, Inc., Westwood Transportation Co., Westwood Transportation Lines, Inc., Lincoln Transit Co. Inc., Atlantic Coach Lines, Inc., and Consolidated Bus Terminal, Inc.

George H. Rosen, the attorney for Mr. Casser's Mohawk Lines, Inc., is the attorney who protested against the compliance order issued September 2, 1941 in the previous protest to Division 5, and is the attorney of record for the appellant, Crescent, in this instant petition.

[fol. 210] This is particularly worthy of note in that on December 9, 1941, in Docket MC-F 1607, the Commission, by Division 5, dismissed the application of Mr. Casser's Mohawk Lines to acquire control of Crescent Express Lines, Inc. This dismissal resulted from a petition to withdraw the application despite the fact that it had been set for hearing, and actually proceeded to hearing on September 4, 1941 before Examiner Higgins. The applicant refused to go on with the hearing stating that it had just been informed of the compliance order of September 2, 1941, defining the operation as an irregular route operator, whereas Mr. Casser's Mohawk Lines had a provision in the contract

that if there was not a regular route certificate the contract could be cancelled.

Through devious other companies, this same operator has been seeking to get a regular route operation in competition with the lawful regular route operators through the use of irregular route, door to door sedan operations which had pending Grandfather applications. The true nature of these other operations would then be discarded and they would be operated as competitive regular route bus operations.

The whole intent and purpose of the present petition is to find some way to operate the Crescent as a regular route bus operation despite the applicant's (Crescent's) own proof that it was an irregular route, door to door, unscheduled sedan operator, and despite the fact that the application of Mr. Casser's Mohawk Lines to acquire control of Crescent was dismissed by the Commission on December 9, 1941.

Under Point I, we shall set forth the facts contained in the Commission's docket, amply supporting the determination that applicant, Crescent, on the Grandfather date, and thereafter, was an irregular route, door to door, non-scheduled sedan operator.

Under Point II, we shall reply to applicant's contentions [fol. 211] that the Commission was without legal right to fully define the Grandfather applications of applicant, Crescent.

Point I

An examination of the docket in the instant case will reveal that an application under Form BMC A was filed by Herman Trevax, Jacob Vangrofsky, Murray Galley, and Morris Glickman, a partnership doing business as Crescent Mountain Service, Bronx, New York. On June 20, 1938, a compliance order was issued to that partnership. This compliance order was protested on the ground that it constituted an order for a regular route operation, whereas the operations were in fact irregular route operations, and the Commission immediately recognized this to be the case and indicated that the file would be referred back to the field office for check and report. Thereafter, and after certain legal questions had been decided by the Commission as a whole in the *Nudelman* case, 22 M. C. C. 275, a new compliance order was handed down setting aside the previous one; and in the new compliance order the Commission performed

its duty of fully describing the type of service rendered by applicant, Crescent, on the Grandfather date, and therefore the type of service to which it would be entitled.

The records in the official docket disclose that on February 12, 1936, the partnership, Crescent, filed an application under form BMC A, and on March 26, 1937, it filed a BMC A-2 application, in which it set forth the type of operation conducted by it, and even did more than this, to wit, it indicated that because of its type of operation it believed it was exempt from the provisions of the Motor Carrier Act, [fol. 212] 1935. Reference to the application BMC A-2, filed as above mentioned, indicates this statement by the applicant:

> "And applicant further reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver of applicant's rights."

In the supplemental Exhibit A, applicant alleged that it went from New York City by way of the George Washington Bridge to Suffern and to Wurtsboro—

> "where traffic is distributed to the summer resorts within a radius of twenty miles from Woodbourne, New York."

Annexed to the application was a map showing the New York area and the way that applicant travelled to the mountain resort area, and indicated on that map a large irregular circle as the area served by it, which was an area having an approximate twenty-mile radius from Woodbourne, New York. This map, which was part of the application, indicated a *territory served*, and did not indicate a route or routes between fixed termini in that area.

Attached to exhibits in the docket was a card submitted by the applicant which reads as follows:

"7 Passenger Cars
Leaving Daily to All Parts of the Mountains
At Lowest Rates
(a number of places were listed)
From Your Home to Your Hotel
Boarding and Rooming Accommodations if desired
Please Call to See Us At Our Residence
About Reservations

CRESCENT MOUNTAIN SERVICE
531 East 169th Street"

[fol. 213] The docket also disclosed protests to the application by a number of protestants, including Hudson Transit Lines, and disclosed that in the beginning of 1938, the Commission questioned the applicant's right to operate by show cause orders, and that the applicant submitted a number of affidavits describing his operations, their type, necessity, etc. Excerpts from some of these affidavits will be here set forth, indicating the type of operation conducted by applicant, Crescent Mountain Service.

Affidavit of Rubin Fried, subscribed and sworn January 10, 1938, among other things, said:

> "The reason for their service is that they transport people to hotels located in all roads and by-roads, obviating the necessity of their passengers having to use foot or other extraordinary means to get to their actual destination.

In the affidavit of Harry K. Cohen, who had a hotel at Woodbourne, subscribed and sworn, January 10, 1938, it was stated among other things:

> "I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service, since May, 1932. Their business had been the transportation of guests of mine from New York City to my hotel, and from my hotel to New York City."

The affidavit of Moe Bail, subscribed and sworn January 10, 1938, and residing at Woodbourne, New York, in referring to the applicants, stated:

> "We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City. * * * I have also been transported by [fol. 214] them from my hotel to New York City. During my passage, I noticed that they picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City."

The affidavit of Izzy F. Feldman, a hotel owner of Woodridge, New York, sworn and subscribed January 10, 1938, stated among other things, in referring to the applicants:

> "They operate seven passenger sedans and carry passengers to and *and* from summer hotels located in

Sulliva naind Ulster Counties. * * * The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of transportation to and from my hotel since 1932. * * * I sincerely believe that their mode of transportation is extremely necessary and convenient for my own and my guests' needs."

The affidavit of Israel Levine, whose store the applicants used at 531 East 169th Street, New York City, subscribed and sworn January 14, 1938, among other things, in referring to the applicants, stated:

"I have personally seen them arranging for said trips with passengers."

The affidavit of Adela Dingenthal of the Bronx, subscribed and sworn January 14, 1938, among other things, said:

"In the summer of 1933 and 1934, I hired the aforesaid persons (referring to the applicants) to transport me and my family from their office to Accord in the County of Ulster. * * * My family and I have personally found that this method of transportation is [fol. 215] most convenient, and the most economical for our purpose."

The affidavit of Edna Livingston of the Bronx, subscribed and sworn January 14, 1938, stated that she had hired the car of applicants to take herself and her family from applicant's office in New York City to North Branch in Sullivan County, and said:

"Riding with us at the times that we were transported to North Branch, New York, by the aforementioned Crescent Mountain Service, were other passengers who were transported to other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake."

(NOTE: A reference to the map will disclose that the operator serving all of these points in the one car was obviously operating over irregular routes and not between fixed termini.)

In the affidavit of Harry Trevax, the father of the applicant, Herman Trevax, sworn and subscribed January 14,

he told how his son had started the business with the other applicants joining in with him, and how he had helped his son, and showed the type of business they carried on when he stated:

> "My wife and I helped him out by answering phone calls and booking work."

It is most important to note that when the Crescent's right to operate was questioned in the beginning of 1938, the applicant brought everything it could, such as diaries showing the reservations for passengers, and all of the [fol. 216] aforesaid affidavits to prove its right to operate, by showing that it had been in operation. It made no claim at that time to any regular route, but merely sought to carry on the business it always had done. Even though it brought everything it could, no attempt was made to produce, and the record shows there was not produced any schedules of operation, such as a regular route operator would have had, and no tickets or ticket sale books, and no advertisements other than the throw-aways indicating the special door to door service, which advertised that it would take people from their home to their hotel. *These proofs clearly disclose that the applicant was not a scheduled operator on regular route between fixed termini, but was a special operator engaged in special operations, territorial in scope, and over irregular routes in unscheduled service, operated with seven passenger sedans.*

After this proof was submitted in the beginning of 1938, the Commission issued a compliance order, dated June 20, 1938, which purported to give to applicant the right to continue the business which he had done, but which erroneously gave him a regular route operation. This was because the Commission had not yet passed upon the many cases involving this question, and the *Nudelman* decision, MC 86772, 22 M. C. C. 275, had not of course been handed down.

Immediately after the issuance of this compliance order, protestants, including Hudson Transit, objected and filed protest, claiming that no regular route operation had ever been run by Crescent. The result of this protest was a letter, as shown by the docket, dated September 14, 1938, addressed to James F. X. O'Brien, Attorney for Hudson Transit Lines, referring to O-106, Docket MC-78980,

[fol. 217] Herman Treyax, etc. d/b/a Crescent, in which Director Blanning stated as follows:

> "The objections filed by you to the order issued in the above entitled proceeding have been duly considered, and you are hereby advised that the facts set forth in support of such objections have been deemed sufficient to warrant referring this case back to the field for further investigation."

The matter was then held up until the questions of law were settled by the Commission as a whole in the *Nudelman* case. These were finally settled when the Commission as a whole, on petition for reconsideration to it, rejected the petition and affirmed the action of the Commission by Division 5 in its determination and decision of the *Nudelman* case, 22 M. C. C. 275. Then the Commission merely proceeded to apply to the facts already in its possession, some of which have been set forth in this brief, the law determined in the *Nudelman* case, with the result that it handed down the compliance order of September 2, 1941, definitely and properly defining the special type of service which Crescent had done, and which it was entitled to continue to do. The Commission further carried out its duty by specifying the territory at each end which could be served by this special operation, and instead of leaving a vague twenty mile radius from Woodbourne, specified the places served by the applicant, which, incidentally, upon examination cover practically all of the townships within a radius of twenty miles from Woodbourne.

The contention that the September 2, 1941 compliance order had no basis in fact is clearly shown to be erroneous by reference to the facts as above mentioned and as contained in the official docket.

The applicant's own statements and presentation clearly [fol. 218] show that the only proper compliance order which could be issued was that of September 2, 1941. In fact, if Crescent had not made the deal with Mohawk, it undoubtedly would have been content to continue the type of operations conducted by it on the Grandfather date instead of trying to find some way to change the nature and type of those operations.

Point II

The petitioner has contended that the Commission had no right to issue the compliance order of September 2, 1941,

which definitely defined the Granfather operations of the applicant and fixed them as non-scheduled door to door operations over irregular routes, with vehicles having only six passengers beside the driver. Petitioner alleges that the Commission has no authority to restrict a carrier to scheduled or non-scheduled operations, but petitioner forgets that if that be part of the definition of the Grandfather operations, and be part of the inherent nature of those operations, then the duty of the Commission is to fully define the Grandfather operations before authorizing the issuance of a certificate without proof of necessity and convenience.

The petitioner quoted a part of Section 208 A of the Act, but left out the pertinent part. For the convenience of the Commission, we here quote the entire Section 208 A:

> "Sec. 208. (a) *Any certificate issued under section 206 or 207 shall specify the service to be rendered* and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, [fol. 219] at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirement established by the Commission under section 204 (a) (1) and (6): Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

As found by the Commission in the *Nudelman* case, this section requires that the Commission "specify the service to be rendered".

If the contention of the petitioner be taken in its broad

aspect, to wit, that a Grandfather operator can add any kind of equipment it wants to as the demands of the public may require, then we would have a situation where a passenger carrier with the right to carry small express parcels could, pursuant to the public demand when larger parcels were presented, purchase and operate trucks over his route or between the authorized territories, and then, if a further demand arose for the carriage of liquid products in bulk in [fol. 220] tanks, purchase that type of equipment and engage in that particular business.

A mere statement of the ridiculous results which could follow the interpretation urged by petitioner is enough to show that it is not the correct interpretation. Such an interpretation would not foster a sound transporting system, but would destroy the efforts of Congress to foster and found such a system.

As pointed out in the *Nudelman* case, decided by the Commission, 22 M. C. C. 275, there is no restriction against the applicant adding to its equipment and facilities additional units of like nature, as long as it does not make additions which change the inherent nature and type of its operations.

All of these contentions were merely a part of the many questions raised and passed upon by the Commission in the *Nudelman* case, MC 86772, reported in 22 M. C. C. 275.

The Commission as a whole, by denial of petition for reconsideration, approved Division 5's decision in that case.

In the petition to which this is a reply, the petitioner makes further claim that a recent decision of the United States Supreme Court supports his contention that the Commission is without authority to issue a compliance order, such as the one of September 2, 1941. He cites the case of *United States of America and Interstate Commerce Commission* v. *Carolina Freight Carriers Corp.*, 62 Supreme Court Reporter 722, 86 L. Ed. 627, and also the accompanying case of *Howard Hall Co.* v. *United States*, 62 Supreme Court Reporter 732, 86 L. Ed. 639.

[fol. 221] Petitioner attempts to find from this case a prohibition by the Supreme Court against the Commission freezing a carrier to its operating status as of June 1, 1935. The case does not hold this at all. The case merely required the Commission to consider and make basic and specific findings on whether an operator, who claimed to be a carrier of general commodities, was in fact only a carrier of certain

specific commodities. On the other hand, an examination of the case fully supports the Commission's decision in the *Nudelman* case when considered by analogy. The Supreme Court said in referring to the difference between regular route carriers and irregular route carriers:

> "The statutory differences lie only in the territorial scope and pattern of the operation."

It should be noted that the Commission in the September 2, 1941 compliance order followed this difference as laid down by the Court, and defined applicant's territorial scope, and defined the true pattern of its operations.

In the *Carolina Freight Carriers* case, the Supreme Court also said:

> "Furthermore, the characteristics of the transportation service rendered are relevant to the territorial scope of the operations which the Commission may authorize."

The Court in that case likewise said:

> "Sec. 208 (a) requires that the certificate specify 'the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory [fol. 222] within which the motor carrier is authorized to operate.' It is clear from these provisions that the power of the Commission to authorize future operations within a designated 'territory,' rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant case, it may extend to all points in a part of that area and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission * * * (6, 7). As we in-

dicated in *Alton R. Co.* v. *United States, supra,* the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior bona fide operations' (314 U. S. —, 62 S. Ct. 437, 86 L. Ed. —). We cannot say that that was denied in this case, if the limitations on the territorial scope of the operations are alone considered. While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service. And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed. That is not this case."

[fols. 223-224] The Commission in the instant case merely carried out its obligation of preserving the substantial parity between the prior bona fide operations of applicant and those operations authorized for the future. It did this in the September 2, 1941 compliance order. It therefore merely did what the law requires.

Conclusion

The petition of Crescent Express Lines, Inc., should be dismissed in its entirety.

Respectfully submitted, James F. X. O'Brien, Practitioner and Attorney for Protestant, Hudson Transit Lines, Inc.

Dated: April 7, 1942.

Certificate of Service

I do certify that on April 10, 1942, a copy of the foregoing reply was served upon the attorneys for all parties of record in the within matter.

James F. X. O'Brien.

[fol. 225] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-78980

In the Matter of CRESCENT EXPRESS LINES, INC.

REPLY OF MOUNTAIN TRANSIT CORPORATION TO PETITION OF APPLICANT FOR RECONSIDERATION BY THE ENTIRE COMMISSION AND/OR TO REOPEN AND GRANT A HEARING—Filed April 13, 1942

Comes now the Mountain Transit Corporation, protestant in the above proceedings, and respectfully replies to the petition herein and prays that the same be denied and in support thereof states as follows:

Applicant's predecessors, a partnership doing business as Crescent Mountain Service, filed BMC-A application on February 12, 1936, and on March 26, 1937, filed a BMC-A2 form, in which it set forth in detail the type of operation which it conducted and for which it sought authority. (It even went so far as to indicate that because of its operations of sedans, that it was exempt from any and all provisions of the Motor Carrier Act and that the filing of the application should not be deemed a waiver of its rights thereunder.) In the Exhibit A attached thereto, the appli-[fol. 226] cant claimed that it went from New York City via the George Washington Bridge to Suffern and Wurtsboro, where traffic was distributed to the summer resorts within a radius of 20 miles from Woodbourne, N. Y. There was annexed a map indicating the New York area and the manner in which the applicant traveled to the area in and about Wurtsboro and *indicated by a large irregular circle as the area served by it.* Attached to the exhibits was a card which read as follows:

"7 Passenger Cars
Leaving Daily to All Parts of the Mountains
At Lowest Rates
(a number of places were listed)
From Your Home to Your Hotel
Boarding and Rooming Accommodations if desired.
Please Call to See Us At Our Residence
About Reservations.

CRESCENT MOUNTAIN SERVICE
531 East 169th Street."

There was no claim made for intermediate points below the mountain area.

On May 7, 1938, a compliance order was issued and on June 20, 1938, corrected compliance order was issued which was in conformance with the then existent practice of the Commission and prior to its determinations in the *Nudelman* case. The corrected order is that described in the petition on pages 1 to 2. Please note that in accordance with the application this order limited the operating authority in the mountain area to "intermediate and off-route points within 20 miles of Woodbourne", whereas the previous order, which had been vacated or which had been corrected and which had been dated May 7, 1938, had read, "All [fol. 227] Intermediate Points" and then, "Off-route points: Points and places within 20 miles of Woodbourne." In other words, the Commission, when it issued its compliance order of May 7, 1938, had at first improperly described the intermediate points and then issued its own corrected order of June 20, 1938, which is the order that the applicant would like to remain in force and effect, to indicate that the intermediate and off-route points were only within 20 miles of Woodbourne.

On June 6, 1938, Exceptions were filed by Protestants to this corrected order on the grounds that, amongst others, no regular route operation over the route was operated in the year 1935 and that the applicant at no time operated between fixed termini.

Prior to the issuance of the compliance orders, order to show cause had been served upon the partnership applicant to dismiss the application. An appearance was then made at informal hearings by an attorney representing the applicants; the application was referred back to the District Office; and additional proof of operation by affidavits and statements were submitted. It was based upon the BMC-A, the BMC-A2, and these affidavits and additional proof that the compliance order of June 20, 1938, as corrected, was issued. These affidavits were made by persons hereafter indicated and contained, among other things, the statements after their names:

1. Rubin Fried—January 10, 1938:

"The reason for their service is that they transport people to hotels located in all roads and by-roads, ob-

viating the necessity of their passengers having to use foot or other extraordinary means to get to their actual destination."

[fol. 228] 2. HARRY K. COHEN, hotel owner—Woodbourne, N. Y.—January 10, 1938:

"I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service, since May, 1932. Their business has been the transportation of guests of mine from New York City to my hotel, and from my hotel to New York City."

3. MOE BAIL—Woodbourne, N. Y.—January 10, 1938:

"We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City. * * * I have also been transported by them from my hotel to New York City. During my passage, I noticed that they picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City."

4. IZZY F. FELDMAN—hotel owner—Woodridge, N. Y.—January 10, 1938:

"They operate seven passenger sedans and carry passengers to and from summer hotels located in Sullivan and Ulster Counties. * * * The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of transportation to and from my hotel since 1932. * * * I sincerely believe that their mode of transportation is extremely necessary and convenient for my own and my guests' needs."

5. ISRAEL LEVINE—store proprietor—used by applicant at 531 East 169th Street, New York City—January 14, 1938:

"I have personally seen them arranging for said trips with passengers."

[fol. 229] 6. ADELA DINGENTHAL—Bronx, N. Y.—January 14, 1938:

"In the summer of 1933 and 1934, I hired the aforesaid persons (referring to the applicants) to transport

me and my family from their office to Accord in the County of Ulster. * * * My family and I have personally found that this method of transportation is most convenient, and the most economical for our purpose."

7. Edna Livingston—Bronx, N. Y.—a person who had hired a car of applicants for herself and her family—January 14, 1938:

"Riding with us at the times that we were transported to North Branch, New York, by the aforementioned Crescent Mountain Service, were other passengers who were transported to other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake."

(Note: A refernce to the map will disclose that the operator serving all these points in the one car was obviously operating over irregular routes and not between fixed termini.)

8. Harry Trevax—the father of one of the applicants—January 14, 1938:

"My wife and I helped him out by answering phone calls and booking work."

In addition to the affidavits as aforementioned, there were submitted the books indicating the manner in which the partnership conducted this business, which were diaries showing reservations for passengers. At no time was there [fol. 230] ever produced any schedules of operation or any proof of operation which a regular route, terminal to terminal operator had used, nor any advertisements, holding outs, leases, or other information indicative of such an operation.

Predicated upon all of this proof, the Commission issued the compliance order of June 28, 1938, as corrected, limiting the applicant's service to points in New York City, on the one hand, and intermediate and off-route points within 20 miles of Woodbourne, on the other, and described a regular route as the method of operating between New York City and the area. Exceptions of protestant being duly filed to the order of June 20, 1938, the Commission

then had before it the complete record upon which it would have to make a determination as to the authority which the applicant was entitled to. There never was a dispute as to the facts.

In the interim, the Commission had before it numerous similar cases and obviously pending the determination of those cases, it withheld any action upon the Exceptions. Finally, the Commission, on February 25, 1941, in MC-86772 *et al., Irving Nudelman et als.*, determined the question. They found that numerous other applicants, operating an identical service and in an identical manner, were special operations and proceeded to issue certificates accordingly. Petitions for reconsideration therein to the entire Commission were subsequently filed and denied.

Accordingly on September 2, 1941, the Commission then issued its order herein stating, amongst other things,

> "*And it is further ordered*, that the previous order issued in this proceeding, describing the authority to [fol. 231] which applicant has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside."

and in the same order stated:

> "This proceeding coming on for further consideration:
>
> *It appearing*, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity upon compliance with the terms of the said order; that protests or exceptions to said order having been duly filed; and further consideration having been had;
>
> *It further appearing*, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; * * *."

(Appearing on the other side of the order)

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or

foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over ir-
[fol. 232] regular routes, is as specified below:

Between New York, N. Y., on the one hand and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Wawarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

On October 9, 1941, applicant, which is the successor to the partnership, filed a protest and petition to stay the issuance of the certificate authorized in the order of September 2, 1941, wherein they urged (p. 4) that the compliance order of September 2, 1941, was issued without notice; that the applicant objects to the new compliance order by reason of the fact that it changes the content of the previous compliance order so as to direct a non-scheduled door-to-door service, over irregular routes, with vehicles having 6 passengers besides the driver; *that the real issue is whether the Commission has the right to restrict a carrier to vehicles of the sedan type;* and in conclusion prayed only that the order of September 2, 1941, should be vacated and set aside and that the order of June 20, 1938, should be reinstated. The petition was denied on September 17, 1942, by Division 5.

The petition herein raises the identical question but for the first time requests formal hearing. It should be denied for the following reasons:

a

There is no question whatever as to the right of the Interstate Commerce Commission to describe in a cer-
[fol. 233] tificate issued by it the service to be rendered and in case of operations not over specified route or between fixed termini, the territory within which the motor carrier is authorized to operate (section 208 (a))

b

All of the facts have already been submitted. No question of fact has heretofore been raised and the only question submitted to this Commission is that of law.

In the *Nudelman* case, MC-86772 *et als.*, decided February 25, 1941, and adopted by the Commission, there appears the following:

> "Upon further consideration we are of the opinion that our prior construction of section 208 (a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, 'the service to be rendered,' subject to the proviso that we cannot restrict the right of a carrier 'to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require.' In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitations to the quantity of the service to be furnished. This construction is in line with our decision in *Pittsburgh-Weirton Bus Co., Inc., Com. Car. Application*, 10 M. C. C. 266, wherein we discussed the meaning of the proviso in question. In that case, the issue was presented as to whether that applicant had inaugurated a new operation by increasing *its service* between two [fol. 234] points from one round trip daily to 250 one-way trips daily. In deciding that question in the negative, we construed the proviso of section 208 (a) to mean (p. 270):
>
> > This prohibition protests the right of the carrier to expand not only its 'equipment' but also its 'facilities'. The only purpose of such expansion is to enable the carrier *to provide more service*, and this is very clearly indicated by the words 'as the development of the business and the demands of the public shall require'. It follows that 'terms, conditions, or limitations' in the certificate restricting *the service* of the carrier would be wholly inconsistent with this proviso." (Italics supplied.) [4]

[4]. In this report wherever any words or phrases are italicized, it should be understood that such emphasis is

"We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the service to be rendered. What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its service to meet the demands of the public.

"With this exception our power to specify in any certificate we issue the service to be rendered is complete. For instance, in *Schwerling Common Carrier Application*, 23 M. C. C. 459, we required the applicant carrier to maintain a schedule of not less than one round-trip per hour during certain periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment. For example: In *Miller Extension of Operations*, 21 M. C. C. 401 (prior report 12 M. C. C. 457), the au- [fol. 235] thority granted therein was restricted to liquid petroleum products in *tank trucks*; in *Myers Common Carrier Application*, 23 M. C. C. 451, authority was restricted to drive-away service; in *Central Truck-Away System, Inc., Com. Car. Application*, 19 M. C. C. 713, authority was restricted to truck-away service; in *Parcel Delivery Service, Inc., Contract Carrier Application*,[5] 8 M. C. C. 275, authority was granted to transport packages and parcels of merchandise by motor vehicle 'the equipment being limited to *motor cycle traffic cars with panel bodies*'; in No. MC-30727 (Sub-No. 1), *The Billy Baker Company Common Carrier Application*, __ M. C. C. __, decided August 23, 1940, authority was granted to transport, among other things, cement in dump trucks; and in *Elizabeth L. Barrows Common Carrier Application*,[6] 19 M. C. C. 179, author-

---

[5] Although this application was later dismissed for reasons not pertinent herein, the same applicant on April 10, 1939, was issued a certificate containing the same restrictions pursuant to *Parcel Delivery Service, Inc., Common Carrier Application*, 13 M. C. C. 15.

[6] No exceptions to the order recommended by the joint board in this case were filed, and not having been stayed or postponed by us, it became effective as our order by opera-

ity was restricted to the transportation of not more than *six passengers per trip*. Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted." (Sheets 4 to 6.)

In the same titled case in a prior report 22 M. C. C. 275, there is a complete description of the operations of sedans in the territory which indicates that the operations of applicant herein, from the complete record as submitted by it to this Commission, were identical both in type of service and in territorial scope. It is important to note that the [fol. 236] proof submitted to this Commission in the form of affidavits and statements makes claim only for the door-to-door territorial service.

The Commission is justified in the restrictions which it places on the geographical scope of applicant's operations. Section 206 (a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor in interest was in bona fide operation on June 1, 1935, within the territory for which applicant made application and has so operated since that time. Section 208 (a) requires that the certificate specify in the case of operations not over specified routes, the territory within which the motor carrier is authorized to operate. It is clear from these provisions that the power of the Commission to authorize future operations within a designated territory rather than over specified routes or between fixed termini fits the peculiar requirements or irregular route operators, such as the applicant. Authority to operate within a specified territory may include permission to service all points in that area. It may be restricted to designated points therein or may extend to all points in a part of the area and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. See *U. S. of America v. Carolina Freight Carriers Corporation*, 86 L. Ed. 627.

Petitioner claims that the Commission has no authority to freeze a carrier to its status of June 1, 1935, and cites the *Carolina Freight* case for that purpose. The *Carolina*

Freight case uses the word "freezing" in the sense that the [fol. 237] Commission had possibly failed to include in the territory involved therein the right to carry certain specific commodities upon the proof of a holding out in respect thereto. In this instance, there has been no attempt to freeze the commodities to be transported since the only items involved were passengers and their baggage between certain points. In accordance with the theory pronounced in the *Carolina Freight* case, the Commission herein has determined upon the evidence submitted by the applicant that it was engaged on June 1, 1935, in an irregular route territorial operation conducted by the use of a specific type of vehicle in a certain type of service limited to certain periods of the year. It has not attempted to exclude the applicant from the right to carry passengers and their baggage as they had previously done, nor from operating as many number of vehicles of the type described as may be necessary to satisfy the needs of the public using that type of service.

The Commission has the right to issue a compliance order describing the Grandfather rights which it will issue in accordance with its findings pursuant to Section 206 and may make such order as is properly descriptive of the type of service which it finds was being rendered on June 1, 1935. Obviously, the applicant herein differs only with the form of the order which the Commission has or should issue. It feels that the previous order should be reinstated, whereas the Commission herein has determined that pursuant to its obligation and duty pursuant to Section 208 to specify the service to be rendered, that it must specify in the certificate just that service which the applicant was performing on June 1, 1935. To reinstate the previous order would not be [fol. 238] properly describing the service rendered on June 1, 1935, but would in effect grant greater authority than that which the applicant was entitled to on that day.

In view of the aforementioned, it is respectfully prayed that the petition herein be denied.

Dated, New York, N. Y., April 11th, 1942.

Respectfully submitted, Henry P. Goldstein, Attorney and Practitioner.

[fol. 239] CERTIFICATE OF SERVICE

I do hereby certify that there has on this 11th day of April, 1942, been served a copy of the foregoing reply upon all the parties of record to this proceeding.

(S) Henry P. Goldstein.

[fols. 240-241] ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of July, A. D., 1942.

No. MC 78980

CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

Upon consideration of the record in the above-entitled proceeding and petition filed by applicant against the order issued March 17, 1942; and good cause appearing therefor;

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission,

W. P. Bartel, Secretary.

[fol. 242] BEFORE THE INTERSTATE COMMERCE COMMISSION

MC 78980

In the Matter of the Petition of CRESCENT EXPRESS LINES, INC.

PETITION TO REARGUE AND/OR REOPEN PETITION FOR RECONSIDERATION AND/OR TO FIX EFFECTIVE DATE OF ORDER—Filed August 10, 1942

Comes now Crescent Express Lines, Inc., and respectfully petitions this Commission.

1. That petitioner received a compliance order herein dated June 20, 1938.

2. That thereafter a new compliance order was issued on or about September 2, 1941.

3. Petitioner filed objections to said new order, which objections were overruled by order dated March 17, 1942. That a further petition to reconsider by the entire Commission was duly filed and was denied by an order dated on or about July 13, 1942.

4. Petitioner respectfully moves for leave to reargue the said denial of the petition for reconsideration and respectfully submits that the Commission may have overlooked [fol. 243] certain points made by the petitioner.

5. The new compliance order of September 2, 1941 was issued after a lapse of more than three years after the issuance of the order of June 20, 1938, and without new or additional evidence to justify the drastic change made; there was no hearing or findings made to support the new order of September 2, 1941.

6. That the form of the rights described in the order of September 2, 1941 is objected to where they differ from the rights described in the order of June 20, 1938, and also upon the further ground that the new order constitutes discrimination. The said order describes the rights granted as follows:

> The service to be rendered by applicant, as authorized by the order of which this is a part in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

7. In George Greenberg, doing business as Greenberg Mountain Service, MC 94298, and in other cases, the description of rights granted in certificate issued on or about July 29, 1942 is as follows:

> Passengers and their baggage, is special operations, during the season extending from the 15th day of May to the 30th day of September both inclusive, over irregular routes, traversing New Jersey for operating convenience,

[fol. 244] Between New York, N. Y., • • • Sullivan County, N. Y.

Restriction: The transportation authorized herein is limited to not more than six passengers in any one vehicle, excluding the driver and children under ten years of age who do not occupy a seat or seats.

8. The difference is unfair and discriminatory as there is no reason for the issuance of the form of the order of September 2, 1941 in the case at bar instead of the form used in the Greenberg Case.

9. In the case at bar applicant desires to seek judicial review of the order issued and the vacating of the order of June 20, 1938; a correction of the order of September 2, 1941 so as to describe the rights granted in the Greenberg Case will limit the issues to be presented for judicial determination.

10. The Greenberg certificate aforesaid, and others, were only issued on or about July 29, 1942, and therefore no reference was made to such form of issuance of rights in prior applications by Crescent Express Lines, Inc., to this Commission. The Greenberg form apparently is now used and a new compliance order so describing the rights granted in this case should be issued. The Greenberg form is new and probably is in line with the Commission's more advanced view of its powers under the Motor Carrier Act. If such form had been in use in September, 1941, the Commission probably would have issued such an order in the case at bar. There have been at least three compliance orders already in the case at bar and further corrections may still be had. The extent of the area served is, of course, different in the [fol. 245] case at bar than in the Greenberg Case. Applicant should have the benefit thereof; assuming that applicant is ultimately unsuccessful in its judicial review of the action of the Commission in vacating the order of June 20, 1938, especially where no hearing was ever had therein.

11. The order of September 2, 1941, and the orders of March 17, 1942 and July 13, 1942 herein do not contain any effective date and it is respectfully prayed that an effective date be fixed as of October 1, 1942 either in respect to said order of September 2, 1941, or if a corrective order is issued, with respect to such corrective order.

12. This application is made without prejudice to any rights which applicant may have to review the action of the Commission in vacating or setting aside the compliance order of June 20, 1938, and in making the order of September 2, 1941, or if this petition is granted in making any new order in the within matter which differs from the said order of June 20, 1938.

Wherefore it is respectfully prayed that this Commission reopen the proceeding herein and change the form of the order as above set forth, all without prejudice to the rights of the applicant to secure judicial review and that an early determination be made with respect to this petition.

Respectfully submitted, (S.) George H. Rosen, Attorney for Crescent Express Lines, Inc., Office & P. O. Address, 302 Broadway, Borough of Manhattan, City of New York.

[fols. 246-247] CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of August, 1942, served a copy of the foregoing petition on all parties of record by mailing a copy thereof postage prepaid.

(S.) George H. Rosen.

[fol. 248] BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of the Petition of CRESCENT EXPRESS LINES, INC.

Docket No. MC 78980

REPLY TO PETITION TO RE-ARGUE AND/OR REOPEN FOR RECONSIDERATION AND/OR TO FIX EFFECTIVE DATE OF ORDER—Filed August 14, 1942

Comes now, Hudson Transit Lines, Inc., protestant, and in reply to the Petition dated August 5, 1942 alleges that said Petition is frivolous and cannot be entertained under the law and the Commission rules. Protestant asks the dismissal of the Petition for the following reasons:

1. This is a second petition for reconsideration by the same party on the same subject matter. It cannot be con-

sidered under Commission Rule XV (f). As shown on the face of the Petition the previous petition to reconsider was denied by the entire Commission on July 13, 1942.

[fol. 249] 2. The compliance order of the Commission dated September 2, 1942 replaced a previous one of June 20, 1938. The 1938 compliance order never became effective due to protests against it, which the Commission then held to be justified. The 1941 compliance order was issued after long litigation before the Commission (Irving Nudelman, Common Carrier Application, No. MC 86772—28 M. C. C. 91) settled (in 1941) the question of whether the Commission could include a description of the type of vehicle to be used where such type was an integral part of the service and necessarily included to fully and adequately describe the service to be rendered as required in Section 208 (a) of the Act.

As soon as this law was settled, the Commission acted on the protests against the former compliance order and corrected it to correspond with the law. There was no unnecessary delay. The facts concerning Crescent's operations had previously been given by it to the Commission in its application and in its affidavits and exhibits and at informal hearing. The 1941 compliance order gave to Crescent the type of service it described and asked for. The 1941 order is fully supported by Crescent's own application and affidavits.

3. Petitioner's pleas in paragraphs 6, 7, 8, 9 and 10 of the petition are in effect a request to the Commission to amend the 1941 order in such a way as to help petitioner misconstrue and incorrectly portray the Commission's ac-[fol. 250] tion, in any proceedings Crescent may take to set aside and annul the Commission's order. The Commission, following the law as found in 28 M. C. C. 91, fully described Crescent's Grandfather operations and issued an order that it be permitted to continue same. In that description it included the type of vehicle because the character or type of service rendered by Crescent on June 1, 1935 was, among other things, differentiated by the use of vehicles carrying not more than six passengers, thus permitting the personalized flexible service not possible of repetition with a different vehicle. The Commission defined the service so as to comply with Section 208 (a) and confined Crescent to

service conforming to its own proof of convenience and necessity as indicated by its Grandfather operations.

Petitioner wants the Commission to amend this description by leaving out an integral part—i. e., the type of vehicle, and then by a separate "Restriction" prevent petitioner from using any other vehicle. Petitioner thinks that while the practical effect is the same, the change will produce a legal effect and make possible the annulment of the Commission's order on appeal to the Courts. Petitioner wants to be able to claim that the description of the vehicle relating to the number of passengers carried was not a part of the Commission's *description of the service to be rendered.*

It would be incorrect in fact and in law for the Commission to make this change. Petitioner's excuse that the form it desires was used in No. MC 95346, George Greenberg, [fol. 251] d/b/a Greenberg Mountain Service, should not be considered for the following reasons:

(a) It was not the truly correct way of describing the service as defined by the Commission in the Greenberg case at the top of Sheet 10 of its decision. The certificate should have followed the decision, and, if it had, it would have been similar to the present Crescent order; and

(b) The reason it appeared as a "Restriction" in the Greenberg case is that was a late Grandfather case where necessity and convenience had to be shown, and in which the applicant stipulated the restriction which undoubtedly caused the Commission to use the form it did. (See Sheet 2, Examiner's Report in the Greenberg case—filed July 24, 1941).

The present Crescent order is correct in its factual description of Crescent's Grandfather operations and is correct in form. It should not be changed and cannot properly be changed and still have it comply with the requirements of Section 208 (a).

In the event of appeal, the true issue can be set up and decided on the order as it is now. To change it would be to help petitioner create a fictitious issue which could only confuse rather than clarify.

[fol. 252] The territory granted in the Crescent 1941 order is as great, if not greater than that set forth in the 1938

order; and is far greater than that allowed in the Greenberg case. It is all that applicant asked for. Petitioner can have no complaint on that issue.

4. Petitioner pretends the Commission's order of September 2, 1941 has no effective date and asked that one be set. This is pure pretense and petitioner's way of laying the basis for an excuse for its unlawful operation of regular route operation between fixed termini with buses of the Manhattan Coach Lines, Inc., which unlawful operation has occurred sporadically and occasionally since the order became effective. Conscent has abandoned its authorized operations, and, in fact, all operations except the occasional and unlawful regular route operation. It also thus attempts to excuse its holding out to be a regular route bus operator recently made in connection with O. D. T. applications to coordinate with another unlawful operator, Royal Cadillac Service, Inc.

The order of September 2, 1941 was effective October 2, 1941 by its very terms. The fourth paragraph provides that Crescent shall not engage in any operations other than those authorized and that this should be effective "*30 days from the date of this order, unless on the Commission's own motion or for good cause shown it is otherwise ordered.*" [fols. 253-254] The Commission did not otherwise *order*, and the September 2, 1941 order became effective October 2, 1941.

It is also to be noted that petition of protest filed by Crescent was denied by Division 5 on March 17, 1942 and by the entire Commission on July 13, 1942.

The order of September 2, 1941 is now and for some time has been effective. It is about time Crescent stopped flouting it.

It is respectfully urged that the present Petition is without merit and should be dismissed.

Respectfully submitted, (S.) James F. X. O'Brien, Practitioner and Attorney for Protestant, Hudson Transit Lines, Inc., 17 Academy Street, Newark, New Jersey.

Dated: August 10, 1942.

CERTIFICATE OF SERVICE

I Hereby Certify that I have on this 12th day of August, 1942 served a copy of the foregoing Reply on all parties of record by mailing a copy thereof with postage prepaid to the attorneys of said parties.

(S.) James F. X. O'Brien.

[fol. 255] BEFORE THE INTERSTATE COMMERCE COMMISSION

MC 78980

In the Matter of the Petition of CRESCENT EXPRESS LINES, INC.

REPLY TO PETITION TO REARGUE AND/OR REOPEN PETITION FOR RECONSIDERATION AND/OR TO FIX EFFECTIVE DATE OF ORDER —Filed August 15, 1942

Mountain Transit Corp., in reply to the petition herein, states as follows:

Applicant's predecessors filed a "grandfather" application setting forth in detail the type of operations which they conducted and for which they sought authority. On May 7, 1938, a compliance order was issued and on June 20, 1938 a corrected compliance order was issued. On June 6, 1938, Exceptions were filed by protestant to the corrected order, and on September 2, 1941, the Commission issued its order, the subject of this petition.

On October 9, 1941, applicant-petitioner herein filed a protest and petition to stay the issuance of the certificate authorized in the order of September 2, 1941, wherein they urged that the compliance order of September 2, 1941, was issued without notice, that the applicant objects to the new compliance order by reason of the fact that it changes the [fol. 256] content of the previous compliance order so as to direct a non-schedule door-to-door service, over irregular routes, with vehicles having 6 passengers besides the driver, that the real issue was whether the Commission had the right to restrict a carrier to vehicles of the sedan type; and in conclusion prayed only that the order of September 2, 1941, should be vacated and set aside and that the order of June 20, 1938, should be reinstated. The petition was denied on March 17, 1942, by Division 5.

On April 3, 1942, applicant petitioner filed a petition for reconsideration by the entire Commission and/or to reopen and grant a hearing in the within matter wherein it requested, amongst other things, that said compliance order dated September 2, 1941 be vacated, set aside, and the compliance order of June 20, 1938, reinstated. On July 13, 1942, the entire Commission denied said petition.

This petition again requests that the proceedings be reopened and that a new certificate in different form be issued, because this Commission in some other case had issued a differently worded certificate.

The petition herein should be dismissed for the following reasons:

(a) The relief requested has already been passed upon and determined by both Division 5 and the entire Commission.

(b) A certificate issued in another proceeding is not determinative of the form or wording of an order in this proceeding.

(c) Any certificate issued in the George Greenberg case MC 94298 was pursuant to a convenience and [fol. 257] necessity application wherein applicant agreed to the limitations contained therein. This application is pursuant to the grandfather clause and the order authorizing a certificate describes properly the type of service rendered on June 1, 1935.

In addition thereto, it is pointed out that the order of September 2, 1941, does contain an effective date reading as follows:

"• • • And That On And After 30 Days From Date Of This Order, unless on the Commission's own motion or for good cause shown, it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized."

The Commission has never ordered any change in the effective date of its order of September 2, 1941 and therefore, the same has been effective since October 2, 1941. The orders of March 17, 1942, and July 13, 1942 are denials of petitions and require no recitation of effective dates.

Wherefore it is respectfully prayed that the petition herein be dismissed.

Respectfully submitted, Henry P. Goldstein, *Attorney and Practitioner for Mountain Transit Corp.*
1450 Broadway New York City, N. Y.

Dated: New York, N. Y., August 14, 1942.

[fol. 258] CERTIFICATE OF SERVICE

I do hereby certify that there has on this 14th day of August, 1942 been served a copy of the foregoing reply upon all the parties of record to this proceeding.

(s) Henry P. Goldstein

[fol. 259] ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of September, A. D., 1942.

No. MC 78980

Crescent Express Lines, Inc.,
New York, New York

Upon consideration of the record in the above-entitled proceeding and petition filed by applicant against the order issued July 13, 1942; and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary.

[fol. 260] Interstate Commerce Commission

Washington

August 20, 1941.

No. MC-F-1607

Mohawk Lines, Inc.—Control—Crescent Express Lines, Inc.

Application of Mohawk Lines, Inc., of Cresskill, N. J., for authority under Section 5, Interstate Commerce Act, as amended, to acquire control, through ownership of stock, of Crescent Express Lines, Inc., of New York, N. Y.

Public notice of the filing of the above-entitled application having been duly served and opportunity having been

accorded for the submission of representations to the Commission, and good cause appearing: Such proceeding is assigned for hearing on September 4, 1941, at 9:00 o'clock a. m. (standard time), at the St. George Hotel, Brooklyn, N. Y., before Examiner John S. Higgins.

Any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall advise the Bureau of Motor Carriers of the Commission, Washington, D. C., to that effect by notice which must reach the said Bureau within ten days from the date of service hereof, the date of mailing of this notice to be considered as the time when said notice is served.

By the Commission, Commissioner Porter.

W. P. Bartel, Secretary.

[fol. 261] ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 9th day of December, A. D. 1941

No. MC-F-1607

Mohawk Lines, Inc—Control—Crescent Express Lines, Inc.

Upon consideration of the record in the above-entitled proceeding, and of applicant's petition, filed November 25, 1941, for the dismissal "without prejudice" of the application herein:

It is ordered, That said petition be, and it is hereby, granted to the extent only that dismissal is sought, and that said application be, and it is hereby, dismissed.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fols. 262-263] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION

It is hereby stipulated by and between the attorney for the plaintiff-appellant, and the attorney for the intervenor-

defendant-appellee, Hudson Transit Lines, Inc., that, by order of the United States District Court made and entered December 23, 1942, the Answer of the defendant, Hudson Transit Lines, Inc., to the original complaint was permitted to stand as its Answer to the Amended Complaint, with the additional allegations denied.

It is further stipulated and agreed that this Stipulation be contained in the record in lieu of including the said Order in its entirety.

George H. Rosen, Attorney for Plaintiff-Appellant.
James F. X. O'Brien, Attorney for Defendant-Appellee, Hudson Transit Lines, Inc.

[fol. 264] [Endorsed:] File No. — Supreme Court, U. S. October Term, 1942, Term No. 1030, Crescent Express Lines, Inc., Petitioner vs. United States, et al. Stipulation as to record. Filed May 17, 1943.

[fol. 265] Supreme Court of the United States

[Title omitted]

Statement of Points and Designation of Record to be Printed—Filed May 24, 1943

I

Appellant, Crescent Express Lines, Inc., states that in its brief and oral argument on its appeal in the above entitled cause it will rely upon all the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the point stated by the appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court except the Motions to Affirm and Statements making against Jurisdiction filed by the appellees.

Also include stipulation of attorney for intervenor-appellee, Hudson Transit Lines, Inc., with respect to inclusion of order dated December 23, 1942.

Dated: May 20, 1943.

Yours, etc., George H. Rosen, Attorney for Plaintiff-Appellant, Office & P. O. Address, 302 Broadway, New York City.

[fols. 265a-266] To: Charles Fahy, Esq., Solicitor General, Department of Justice, Washington, D. C. Daniel W. Knowlton, Esq., Chief Counsel for Interstate Commerce Commission, Washington, D. C. Henry P. Goldstein, Esq., 1450, Broadway, New York City. James F. X. O'Brien, Esq., 17 Academy Street, Newark, New Jersey.

[fol. 267] State of New York,
County of New York, ss:

Beatrice Martin, being duly sworn, deposes and says that on the 20th day of May, 1943, deponent mailed copies of the Statement of Points and Designation of Records to be printed enclosed in postpaid wrappers in a post office box maintained by the United States Government at 302 Broadway, Borough of Manhattan, New York City, addressed to the following:

Charles Fahy, Esq., Solicitor General, Department of Justice, Washington, D. C. Daniel W. Knowlton, Esq., Chief Counsel for Interstate Commerce Commission, Washington, D. C. Henry P. Goldstein, Esq., 1450 Broadway, New York City. James F. X. O'Brien, Esq., 17 Academy Street, Newark, New Jersey.

Beatrice Martin.

Sworn to before me this 20th day of May, 1943. Rebecca Rodoff, Notary Public, Kings County.

[fol. 268] [File endorsement omitted.]

[fol. 269] Supreme Court of the United States

Order Postponing Further Consideration of the Question of Jurisdiction—June 7, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits and the case is transferred to the summary docket.

Endorsed on Cover: File No. 47,531, D. C. U. S., Southern New York. Term No. 65. Crescent Express Lines, Inc., Appellant, vs. The United States of America, Interstate Commerce Commission, Hudson Transit Lines, Inc., et al. Filed May 17, 1943. Term No. 65 O. T. 1943.

FILE COPY

MAY 17 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1030 65

CRESCENT EXPRESS LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

GEORGE H. ROSEN,
Counsel for Appellant.

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Section 207(a), as amended 4
Section 208(a), as amended 4, 7, 8, 9
Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. C. A., Title 28, Section 47a 1

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC.,
Plaintiff,

against

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, plaintiff submits herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain this direct appeal to review the decree and judgment rendered herein.

(A) The Statutory Provisions Believed to Sustain the Jurisdiction.

The statutory jurisdiction of the Supreme Court to review by direct appeal the decree and judgment complained of is conferred by:

Section 210 of the Judicial Code, Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. C. A. Title 28, Section 47a.

(B) This action does not involve the validity of any statute of any state or of any statute or treaty of the United States.

(C) The Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The decree and judgment sought to be reviewed was dated February 27, 1943 and filed and entered in the above entitled action on March 6, 1943.

The petition for appeal herein was presented and filed on April 16, 1943.

(D) Statement Showing That the Nature of the Case and the Rulings of the Court Were Such As to Bring the Case Within the Jurisdictional Provisions Relied Upon.

On September 2, 1941, Division 5 of the Interstate Commerce Commission made its order for a certificate under the grandfather clause of Section 206 (a) of the Motor Carrier Act of 1935 as amended, and which said order, although granting rights to the plaintiff, did restrict and limit the said rights illegally and improperly as plaintiff claims and as more fully set forth hereinafter.

That thereafter objections were duly filed by the plaintiff against the order of September 2, 1941 but the said Commission by Division 5 made its order dated March 17, 1942 denying the same. That thereafter an application was made by the plaintiff for reconsideration by the entire Commission but the Interstate Commerce Commission denied said petition for reconsideration or hearing by order dated July 13, 1942.

On September 9, 1942 an action was instituted by the plaintiff in the United States District Court for the South-

ern District of New York to vacate, annul and set aside the said order of the Interstate Commerce Commission upon the ground that the same was granted improperly and illegally and to reinstate a prior order made by the Commission dated June 20, 1938 which properly described the rights to which the plaintiff was entitled. Plaintiff secured leave to serve an amended complaint and issue was joined thereon. On January 14, 1943 the case was argued before a Statutory Court consisting of one Circuit Court of Appeals Judge and two District Court Judges, upon the record made before the Interstate Commerce Commission.

That thereafter the said Statutory Court rendered its opinion, a copy of which is annexed hereto. Thereafter the Court made its Findings of Fact and Conclusions of Law and Decree and Judgment, both dated February 27, 1943 and both filed in the office of the Clerk of the said District Court on March 6, 1943, wherein and whereby the said amended complaint was dismissed with costs. A copy of the said Decree and Judgment and Findings of Fact and Conclusions of Law are attached hereto marked Exhibits "A" and "B".

The rulings of the Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon because such rulings dismissed the action on the merits and said Decree and Judgment denied to the plaintiff the relief sought in the said action.

The following cases are believed to sustain the jurisdiction of the Supreme Court:

U. S. v. *Maher*, 307 U. S. 148;

Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125;

U. S. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475.

(E) Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

This appeal presents for determination the following:

An interpretation of Section 203 (a) subdivision 13 of the Motor Carrier Act of 1935, (which was amended on June 29, 1938 and reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 303).

An interpretation of Section 206 (a) of the Motor Carrier Act of 1935, (which was amended on June 29, 1938 and reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 306).

An interpretation of Section 207 (a) of the Motor Carrier Act of 1935, (reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 307).

An interpretation of Section 208 (a) of the Motor Carrier Act of 1935, (reenacted in the Interstate Commerce Act of 1940; U. S. Code Title 49 Sec. 308).

This appeal also presents the question of whether the Commission has the right to restrict the plaintiff under the above provisions to any particular type of motor vehicle such as small cars, and in the absence of such authority whether the Commission can do so indirectly, by restricting the plaintiff from transporting more than six people at any one time regardless of the size of vehicle used.

The appeal also presents the question of whether the Commission has the right to limit the plaintiff to door-to-door service, irregular routes, non-scheduled operations and to an alleged description of such operations as special operations. The question of the Commission's power under Sections 206, 207 and 208 of the Motor Carrier Act are brought in question and the extent of the power of the Commission requires a final determination.

The appeal also presents the question of whether the Commission had the right to vacate the order of June 20, 1938 wherein the Commission properly granted the rights

to which the plaintiff was entitled, and granted the order of September 2, 1941 vacating such rights, without any procedure or evidence to sustain the order of September 2, 1941.

Facts.

This action has been instituted by plaintiff to set aside, vacate, annul and enjoin an order of the Interstate Commerce Commission dated September 2, 1941, whereby the said Commission by Division 5 granted to plaintiff certain "grandfather" rights but which plaintiff claims were too limited as more fully set forth herein; and which limitations were unlawful and in excess of the statutory power of the Commission.

Plaintiff is entitled to grandfather rights because it or its predecessors operated on and after June 1, 1935 the "grandfather" date, and under Section 206 (a) of the Motor Carrier Act of 1935 applicable thereto, a certificate had to be issued. The order of September 2, 1941 granted a certificate but limited the rights granted. This action raised the question of whether the form and extent of the certificate granted by the Commission was correct and whether the Commission had the power to restrict the rights granted in the manner complained of.

The Commission, after investigation, issued a compliance order dated June 20, 1938 which properly described the certificate to which plaintiff was entitled and was based on the evidence before the Commission. An order similar to the said order of June 20, 1938 had been issued previously on May 7, 1938 and was reissued as the order of June 20, 1938.

After the lapse of over three years the Commission without any further evidence, investigation or hearings issued a new compliance order dated September 2, 1941 which is the subject of the action.

For many years plaintiff's predecessors conducted operations between various points in Sullivan and Ulster Coun-

ties, New York and New York City, transporting passengers for hire. In October 1940, plaintiff purchased these rights and was substituted as successor in interest pursuant to the rules and regulations of the Interstate Commerce Commission and the statute applicable thereto.

Plaintiff objects to the order of September 2, 1941 in the following respects, to wit,

1. The limitation of the operating rights so that plaintiff should transport not more than 6 passengers in any one vehicle, not including the driver thereof and not including children under 10 years of age who do not occupy a seat or seats.

2. To the limitation to door-to-door service.

3. To the limitation to irregular routes.

4. To the limitation to non-scheduled operations.

5. To the limitation or description of the rights as special operations.

The scope of the operations conducted by the plaintiff and its predecessors consisted of transporting passengers from New York City to various points in Sullivan and Ulster Counties in the mountain area. These points are within the State of New York and vehicles traversed the State of New Jersey for convenience only. Vehicles operated daily during the seasonal period authorized carrying passengers in both directions. Individual passengers were sold individual tickets the same as any railroad transports individual passengers. Vehicles left New York City via bridge or tunnel and then travelled to Suffern and Route 17 in New York State, along Route 17 to Monticello, Liberty and Roscoe, in Sullivan County, and from Wurtsboro along Route 209 to Ellenville, Napanoch and Kerhonkson, in Ulster County. The same route was used when vehicles left the mountains going to New York City.

Argument.

Plaintiff contends that the Commission has no statutory power to limit plaintiff from using any type or size of motor vehicle which it desires to use, and that the statutes applicable expressly give plaintiff that right and expressly limit the Commission's power to restrict such right.

At the outset, plaintiff states that it used motor vehicles in its operations. These vehicles were of the sedan or limousine type seating 7 persons. The order of June 20, 1938 did not restrict plaintiff to any particular type of motor vehicle directly or indirectly. The order which is the subject of this action has ignored the statute applicable in making the restriction prohibiting the plaintiff from transporting more than 6 persons at any one time.

Section 203 (a), Subdivision 13, of the Motor Carrier Act of 1935 defines a motor vehicle as follows:

> "(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 208 (a) of the Motor Carrier Act of 1935 provides as follows:

> "Any certificate issued under sections 206 or 207 shall specify * * *: *Provided, However,* That no terms conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

It is to be noted that the restriction made by the Commission in the order of September 2, 1941 does not prevent

plaintiff from using any kind or type of vehicle but merely restricts plaintiff from transporting more than 6 passengers in the vehicle used. This is very peculiar because it permits the plaintiff to use a bus seating 40 people but prevents the plaintiff from filling the seats in excess of the maximum 6. Inherent in the very restriction is the recognition that the type or size of vehicle could not be limited or restricted as set forth in Section 208 (a) of the Act. The Commission has attempted to circumvent the statute by preventing the transportation of more than 6 persons at one time.

The question, therefore, is very simple; that is whether the Commission has the right to do indirectly what it could not do directly. This proposition of law is so elementary that no citation of authority is needed. The law itself specifically recognized that all motor driven vehicles should be treated alike and to prevent any restriction of the use of different or larger type vehicles made the definition of a motor vehicle all inclusive so as to cover all types of motor vehicles.

The lower court went beyond the Commission's order and held that under Section 208 (a) that the limitation must be read "quantitatively". The lower court held that the plaintiff could add as many vehicles of the same type as it wished and in that manner construed the limitation under Section 208 (a) (U. S. Code Title 49 Sec. 308 (a)), although there is nothing in the statute which justifies the construction that plaintiff is to be confined to the precise type of vehicle that it used on June 1, 1935. The lower court has added to the clear phraseology of the statute a restriction not therein contained. The Commission itself, in the order of September 2, 1941 authorized the transportation of not more than 6 people at one time without regard to the size of the vehicle used. Plaintiff's position is therefore that the lower court misconstrued the statute and misunderstood the meaning of the order made by the Commission. The

lower court was in error in interpreting Section 208 (a) as merely giving the plaintiff unlimited right to add the identical type vehicles when the statute itself expressly prohibits any restriction upon a carrier adding to its equipment and facilities.

The effect of the decision of the lower court and of the order of the Commission is discriminatory. A freight operator using 1-ton trucks on June 1, 1935 is permitted to add larger vehicles to its equipment such as 8 and 10-ton trucks whereas a passenger carrier is frozen to the precise type of equipment used on June 1, 1935. This is without any statutory authority and is contrary to the express wording of Section 208 (a), the statute in question.

As will be indicated post, the lower court ruled that one of the other limitations placed on plaintiff's certificate, to wit, door-to-door service, permitted the plaintiff to pick up passengers at various stations. This results in a very impractical situation. If plaintiff wishes to take 36 passengers from a given station in New York City to a given station in the mountain area, to wit, Monticello, plaintiff will have to operate 6 individual cars with 6 individual drivers instead of placing all of the 36 passengers on one vehicle going from the particular station in New York to the particular station at Monticello. Such a result is a privilege which the plaintiff has the right to exercise and plaintiff is not confined to using 6 individual cars instead of one large vehicle to accommodate the 36 passengers. The use of such a larger vehicle does not improve the quality or change the type of service, but merely is a convenient, economical and expeditious way of transporting 36 people in a single vehicle between the two stations indicated. There is no more justification for the Commission trying to freeze the plaintiff so that no more than 6 passengers are transported at any one time than there is for the lower court to go beyond the Com-

mission's decision and try to freeze the plaintiff to the use of a specific type of vehicle.

In *United States of America* and *Interstate Commerce Commission* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 the Court said at page 488:

> "Its prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities as was done here not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights."

See also

Alton R. R. Co. v. *United States*, 315 U. S. 15.

The five additional limitations set forth supra are contrary to Section 206 (a) and Section 208 (a) of the Motor Carrier Act of 1935. Section 206 (a) states that a grandfather operator is entitled to a certificate because of having operated on June 1, 1935 over the route or routes or within the territory and does not place any restriction or limitation beyond those indicated. Section 208 (a) states that a certificate authorizing the service to be rendered shall specify the service and the routes or the territory. Nothing contained in either of those two sections indicate the limitation to door-to-door service, or scheduled or non-scheduled service and the inclusion of those two restrictions in the order of September 2, 1941 is unjustified. This is particularly so in view of the Finding of Fact numbered "3" and the Conclusion of Law numbered "3" and the opinion of the lower court that plaintiff may pick up passengers at any station. If by door-to-door service is meant any service, station or door service, then the restriction is utterly meaningless and should be eliminated. There is nothing

in the statute which justifies a limitation to non-scheduled service because the statute prescribes that service authorized shall be over route or routes or within a territory and the inclusion of the limitation of non-scheduled operations is without statutory authority. The Commission did not include any restriction with respect to non-scheduled operations in the following cases:

Alfred Koopman, MC 95430, Charles Filler, MC 96100, Samuel Schick, MC 95407, Ben Friedman, MC 95431 and *George Greenberg, MC 95349.*

The limitation set forth in the order of the Commission of September 2, 1941 to irregular routes is illegal and void because plaintiff's operations were over regular routes and the Finding of Fact numbered "4" made by the lower court clearly states that fact. The distance between New York and Wurtsboro is about 85 miles and the total distance from New York to Monticello is only about 96 miles. The greater portion of plaintiff's route having been found to be over a regular route, the restriction to irregular routes is without evidence to support same and is directly contrary to the evidence. The order of June 20, 1938 properly described the routes to which plaintiff was entitled. The statute authorizes the issuance of a certificate over regular routes or within a territory and there is nothing to justify a restriction to irregular routes. Such a restriction or authorization would apply to a charter operator and not to an operator such as the plaintiff transporting passengers between two given points in daily service.

The limitation or description of plaintiff's operations as special operations is ambiguous and void. The words "special operations" do not apply to the plaintiff. The Commission itself used the terminology of special operations as meaning charter operations under Section 207 (a). In the

case of *Peninsula Transit Corp.*, 1 M. C. C. 440, 442 the Commission held that special or charter operations mean:

> "Only those common carriers of passengers who are engaged, or propose to engage exclusively in the transportation of special or chartered parties are required to obtain a certificate specially authorizing such operations."

The *Peninsula* case differs from the case at bar because plaintiff charges individual fares to each passenger going to a different destination, and passengers do not charter the entire vehicle.

In the *Red Star Sightseeing Lines, Inc.*, 1 M. C. C. 521, the Commission held with respect to special operations that (p. 525):

> " * * * we conclude that the proposed sightseeing and pleasure tour operations of applicant are special operations within the meaning of that term as used in the proviso to Section 207 set forth above."

At Page 526 the Commission said:

> "We find that the present and future public convenience and necessity require the issuance of a certificate to applicant authorizing it to operate as a common carrier by motor vehicle, in special operations for the transportation in interstate or foreign commerce of passengers and their baggage on round-trip sightseeing or pleasure tours over irregular routes beginning and ending at Broadway and Palmetto Street, Brooklyn, N. Y., with no pick-up or discharge of passengers or baggage at any point * * *".

In the *Red Star* case every one went on the same tour or pleasure trip, starting out and returning together, but the plaintiff in the case at bar does not conduct that type of business. Plaintiff sells tickets to individuals, takes passengers going to different destinations in the same vehicle, takes

passengers in one direction and other passengers in the reverse direction, operates several times daily, and in fact carriers on a regular common carrier business which in no respect falls under the attempted description of "special operations".

The Commission in the Case of *John G. Schuster MC 106*, decided November 10, 1942 found with respect to seasonal operations that applicant was a common carrier entitled to operate:

> "* * * in special operations on round-trip sightseeing or pleasure tours beginning and ending in Shenandoah, East Mines, * * * with no pickup or discharge of passengers and baggage en route, * * *".

It is therefore obvious that the term "special operations" does not apply to the plaintiff because plaintiff conducts regular common carrier operations between New York City on one hand and various points and places in Sullivan and Ulster Counties, New York on the other. Special operations as construed in the *Red Star* case supra and in the *Schuster* case supra creates confusion and would mean that plaintiff would have to conduct round trips sightseeing tours which is not the type of business plaintiff is engaged in.

The lower court herein interpreted the meaning of the words special operations as set forth in its opinion as meaning the same thing as operations not over specified routes i. e. operations within a defined territory not upon regular routes or between fixed termini. The Commission's interpretation of special operations as indicated above means charter operations so that the plaintiff is confronted with a situation where it is uncertain of the meaning of the words "special operations" and in any event, plaintiff's operations are not special operations

because plaintiff conducts and has conducted a common carrier business transporting passengers in both directions, with individual tickets. The lower court in its opinion states in Finding of Fact numbered "6" that notice was given to the plaintiff of a new hearing but in the certified transcript of the record procured by the plaintiff and submitted to the court, there was no proof as to such notice; and in the opinion of the lower court the court said that there was nothing improper in the procedure adopted by the Commission in changing its decision. It should be noted that the order of June 20, 1938 was made by Division 5 and the order of September 2, 1941, which is the subject of this action, was made by Division 5 and there was no justification for the change made by said Division 5 of the Commission without any evidence to support the same. The said Finding of Fact numbered "6" finds the fact that there wasn't any additional evidence to support the order of September 2, 1941, so that plaintiff's position is that the making of the order of June 20, 1938 by the Commission by its Division 5 should stand in the absence of any proof given by the protestants, or otherwise, and that the order of September 2, 1941 was not based upon proper procedure or legal evidence to support same.

The Commission did not make any findings of fact to justify the order of September 2, 1941 and the absence of proper findings of fact requires that the said order of September 2, 1941 be vacated and set aside and to that end, that the Decree and Judgment of the lower court be reversed.

State of Florida v. *United States*, 282 U. S. 194, 215;
United States v. *Chicago, Milwaukee, St. Paul R. R. Co.*, 294 U. S. 499, 504;
Wichita R. R. Co. v. *Public Utilities Commission*, 260 U. S. 48, 58;

Atchison Railway Co. v. *United States*, 295 U. S. 193, 201;

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

Copies of the findings of fact, conclusions of law, the decree and judgment and opinion of the Statutory Court, and the orders of the Interstate Commerce Commission dated September 2, 1941 and June 20, 1938, are attached hereto.

Respectfully submitted,

GEORGE H. ROSEN,
Attorney for Plaintiff,
Office & P. O. Address,
302 Broadway,
Borough of Manhattan,
City of New York.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 19-339.

CRESCENT EXPRESS LINES, INC., *Plaintiff*,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

—and—

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, *Intervenors*.

Before: L. Hand, Circuit Judge and Caffey and Hulbert, District Judges.

This cause came on to be heard at the January, 1943, term of this court, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, Adjudged and Decreed, that the amended complaint herein be, and the same hereby is dismissed upon the merits with costs.

Dated, February 27th, 1943.

LEARNED HAND,
United States Circuit Judge.
FRANCIS G. CAFFEY,
United States District Judge.
HULBERT,
United States District Judge.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC., *Plaintiff*,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

—and—

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, *Intervenors*.

The Court makes the following findings of fact and conclusions of law.

Findings of Fact.

1. The plaintiff was carrying passengers by motor for hire on June 1, 1935, and thereafter from New York City through New Jersey to points and places in Sullivan and Ulster Counties, New York.

2. Its route was from the Borough of the Bronx over the Washington Bridge, thence by Routes 4 and 2 in New Jersey and Route 17 in New York, to Wurtsboro whence it delivered its passengers within 20 miles of Woodbourne, New York.

3. The plaintiff carried its passengers in both directions daily during the season authorized, but only in cars such as those described in the eighth finding, picking them up at their houses and dropping them at their hotels or boarding houses; and vice versa. In some cases it picked them up at an "office" at 531 East 169th Street, in the Bronx, or at a fixed station in Woodbourne.

4. That part of the route which was between New York and Wurtsboro was always over the same roads.

5. The plaintiff's operations were not upon any schedule.

6. Before changing the certificate granted on June 20, 1938, the Commission gave notice to the plaintiff of a new hearing, but it did not take any additional evidence to support the order of September 2, 1941.

7. The certificate issued on September 2, 1941 truthfully "specifies" the service rendered by the plaintiff and its predecessors as of June 1, 1935.

8. The certificate restricts the plaintiff to the use of cars, capable of carrying not more than six passengers, not including the driver and children under 10 years of age who do not occupy a seat or seats.

Conclusions of Law:

1. The order of September 2, 1941 was adequately supported by evidence.

2. The Commission lawfuly restricted the equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935.

3. The restriction in the certificate upon plaintiff's service to non-scheduled operations was lawful; so too was the certificate's description of the authorized route as "special" and "irregular"; and the service as "door-to-door"; but the last description does not forbid the plaintiff from picking up passengers at 531 East 169th Street in the Bronx, or at any fixed station in Sullivan County, or at any other station.

4. The amended complaint should be dismissed upon the merits with costs.

Dated, February 27th, 1943.

LEARNED HAND,
United States Circuit Judge;
FRANCIS G. CAFFEY,
United States District Judge;
HULBERT,
United States District Judge.

EXHIBIT "C".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 19-339.

CRESCENT EXPRESS LINES, INC., *Plaintiff,*

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

—and—

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION, *Intervenors.*

Before: L. Hand, Circuit Judge, and Caffey and Hulbert, District Judges.

Upon final hearing before a court, convened under Sec. 47 of Title 28, U. S. Code, of an action brought under Sec. 41 (28), Title 28, U. S. Code, to set aside an order of the Interstate Commerce Commission.

George H. Rosen, for the plaintiff.

Robert L. Pierce, for the United States.

E. M. Reidy, for the Interstate Commerce Commission.

James F. X. O'Brien, for Hudson Transit Lines, Inc., Intervening.

Henry P. Goldstein, for Mountain Transit Corp., Intervening.

L. HAND, *C. J.:*

This cause comes on before a court, convened under Sec. 47 of Title 28, U. S. Code, for final hearing of an action brought under Sec. 41(28) of Title 28, U. S. Code, to set aside an order of the Interstate Commerce Commission, and thus to reinstate its earlier order which the order appealed from modified. The plaintiff is a common carrier by motor, a corporation which succeeded to a partnership from which

we need not distinguish it. On June 1, 1935, it was operating a fleet of six sedan motor cars, each capable of seating seven persons—six passengers and the driver—between New York City, (chiefly from the Borough of Bronx), and points in Ulster and Sullivan Counties, over a route, part of which was in New Jersey. On February 12, 1936, it filed an application with the Commission under Sec. 306(a) of Title 49, U. S. Code, (the "Grandfather Clause" of the Motor Carrier Act of 1935), for a certificate authorizing it to continue this service, which on March 26, 1937, it supplemented by a more formal application, accompanied by supporting affidavits. A protest against the grant of such a certificate having been made, the case came on for hearing on November 30, 1937, at the New York district office of the Commission and proofs were taken. On May 7, 1938 the Commission entered an order, which it modified in unessential details by a second order entered on June 20, 1938, which is the order that the plaintiff wishes reinstated. This order awarded a certificate to the plaintiff which described the service to be rendered as being "over the regular route, between fixed termini, and to and from intermediate and off-route points" for four summer months "between New York, N. Y. and Woodbourne, N. Y.". After specifying the route in detail the certificate concluded: "Intermediate and off-route points within 20 miles of Woodbourne." Protests against this order were at once filed by a number of bus lines and the matter was referred back to the division for further investigation. Notice of a further hearing for December 1, 1938, was given, at which however no new evidence was taken, and which the plaintiff apparently did not attend. The Commission, having before it many applications involving the "Grandfather Clause", and being divided as to its meaning, withheld decision until September 2, 1941, when it superseded its certificate of June 20, 1938, and granted another in the following terms:

"The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in nonscheduled door-to-door service, limited to the transporta-

tion of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

"Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenberg, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

The plaintiff, which had been satisfied with the first certificate, objected to the second, and, after two petitions for rehearing had been denied, (one addressed to the division which had issued the certificate, and the other to the whole Commission), brought this action on September 30, 1942. The amended complaint alleged that the second certificate was unlawful, because it should not have limited the plaintiff in five particulars: 1.) to vehicles carrying only six passengers and the driver; 2.) to "door-to-door service"; 3.) to "irregular routes"; 4.) to "non-scheduled" service; 5.) to "special operations." In addition the complaint challenged the power of the Commission to modify the certificate of June 20, 1938, without taking further evidence, and holding another hearing. Answers having been filed, the cause came on for hearing upon the pleadings and the record of the proceedings before the Commission.

The case turns upon three sections of the Motor Carriers Act, (Secs. 306, 307 and 308 of Title 39, U. S. Code), which subject "common carriers"—as distinct from "contract carriers", (Sec. 309)—generally to the control and regulation of the Commission by requiring them to obtain certificates of "public convenience and necessity", similar to those required of common carriers by rail for extensions of their lines, (Sec. 1(18), Title 49, U. S. Code). The proviso to Sec. 308(a), upon which the plaintiff must rely for the scope which it claims for its certificate, applies to all certificates granted to "common carriers" under Sec. 307(a), whether under the "Grandfather Clause", or otherwise; and it will be clearer to consider the Commission's

powers as a whole before taking up that clause itself. After giving general superintendence over the subject-matter to the Commission by Sec. 306(a), Congress in Sec. 307(a) directed it to issue certificates, when these are "required by the present or future public convenience and necessity." The section concludes with a proviso which limits such certificates, in the case of passenger carriers, to "regular * * * routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations." Section 308(a) defines what shall be the contents of such certificates: they must "specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in the case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." (We interpret "special * * * operations" in the proviso to Sec. 307(a), as meaning the same thing as "operations not over specified routes," just quoted from Sec. 308(a): i. e. operations within a defined territory not upon regular routes, or between fixed termini). Finally, Section 308(a) makes "the exercise of the privileges granted" by a certificate subject, both at its issue and at any later time, to "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require."

Thus it appears, not only because the certificate is to "specify the service to be rendered" as well as the routes over which it shall be rendered, but also because that service is to be always subject to regulation in the interests of the public, that Sec. 308 (a)—unless because of its proviso—, leaves complete regulatory power in the Commission's hands. That proviso does, however, set a limit upon its power, and the result at bar depends upon what that is. It declares that none of the "terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require." The parties at bar appear to assume that this is more than merely a direction for the guidance of the Commission; and that, ex proprio vigore, it gives the carrier the privilege

without recourse to the Commission of adding to his service as he may find it desirable to do so. That is indeed probably its true meaning: in any event we shall assume so for the purpose of this case, for in any event it must be read quantitatively. As we have already observed, the Commission must not only prescribe the route over which the carrier shall operate, but it must also "specify the service to be rendered." No one suggests that the proviso to Sec. 308(a) authorizes the carrier to change the prescribed route, and there is as little reason for saying that it justifies a change in the service to be rendered. Unless that feature of the certificate is to become a dead letter, and the Commission is to be stripped of all power except to fix routes, the carrier cannot have power substantially to modify the quality of his service, however free he may be to "add" to it in amount; and certainly nothing can more directly touch the quality of transportation than the cars in which passengers are carried. Indeed, limitation as to the quality of the service was inevitable in the public interest: a line of light small passenger cars—like those here at bar—may be desirable however numerous, over routes upon which a fleet of powerful, heavy, commodious, motor busses, capable of seating forty or fifty passengers, and weighing perhaps ten tons, would be wholly unsuitable.

The proviso in Sec. 306(a)—the "Grandfather Clause"—was apparently inserted to avoid the hardship which would result from forcing a carrier to justify his existing business in terms of public convenience. It was meant to accept the motor vehicle system as it was; it recognized as vested such rights as had grown up before Congress asserted any public interest in motor transportation; and consistently, the rights protected should be measured by past user. Strictly, it was therefore an anomaly to give carriers who secured certificates under the "Grandfather Clause", the privilege of indefinite quantitative expansion. The only reason for dispensing with the Commission's supervision—i. e. the injustice involved in stopping a business which had grown up in reliance upon the failure of Congress to act—ceased with the protection of the business as it stood when regulation began; and possibly Congress did not realize

that it was going as far as it did. Be that as it may, if the holders of such certificates have the same unlimited power to change the quality of their service as they have to add to its quantity, Congress, in an effort to prevent the unduly harsh impact of a new system, created a favored group of carriers, substantially free from all regulation over those routes on which they may have chanced to operate on June 1, 1935. So far at least, it is safe to say that Congress did not mean to go.

It follows from what we have just said that all those limitations of which the plaintiff complains were properly imposed upon its certificate, for all served to "specify the service to be rendered". There can be no debate about the first, which confines the service to cars holding only seven persons. The second, describing the business as a "door-to-door service", is not to be understood as preventing the plaintiff from picking up passengers either at No. 531 East 169th Street in the Bronx—said to be its New York "office"—or at any fixed place in the village of Woodbourne or elsewhere; and when so understood, the description is accurate, for it does do a "door-to-door" business. The Commission is certainly not limited to the exact words of the statute; it could not properly "specify" the service at all, if it were. Third: it was also proper to describe the route as "irregular". A "regular" route means one which has only "fixed termini", not one which always traverses the same roads for part of its route. The fact that the plaintiff picks up and sets down its passengers at places of their own choosing make its whole route "irregular". Its professed fear that its privilege of passing over the same roads between the Bronx and Wurtsboro may be forfeited is altogether fanciful. Fourth: the service was properly described as "non-scheduled", for such it is; if the plaintiff wishes to run on a schedule, it must apply to the Commission for a change. Fifth: the operation was "special" for that word—borrowed from the proviso in Sec. 307(a)—is used, as we have already indicated, in contrast with a "regular" route "between fixed termini".

Finally, we can see nothing improper in the procedure adopted by the Commission in changing its decision; it

acted upon the same record and after notice to the plaintiff of a new hearing. True, the interval between the orders were long; but the whole subject was new and confused, and the Commission itself was divided in opinion. The plaintiff was deprived of no right, substantial or procedural, and indeed does not even now allege that any other evidence would have changed the result.

The amended complaint will therefore be dismissed: findings and a judgment are filed herewith.

Complaint dismissed.

EXHIBIT "D".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 2nd day of September, A. D., 1941.

No. MC 78980

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity upon compliance with the terms of the said order; that protests or exceptions to said order having been duly filed; and further consideration having been had;

It further appearing, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216 and 217 of the Interstate Commerce Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, and upon filing appropriate publications providing for the cancelation of any effective rates or charges applying to transportation service in excess of that herein or otherwise lawfully authorized, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with

the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

[SEAL.] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 2nd day of September, A. D. 1941.

No. MC 78980

APPLICATION OF CRESCENT EXPRESS LINES, INC.,

NEW YORK, NEW YORK.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in nonscheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1, to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

EXHIBIT "E".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 20th Day of June, A. D. 1938.

No. MC 78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby denied, *and that on and after 30 days from date of this order*, unless on the Com-

mission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceeding.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with the requirements therein specified, be and it is hereby vacated and set aside.

By the Commission, division 5.

[SEAL.] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 20th day of June, A. D. 1938.

No. MC 78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route

points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:

Between New York, N. Y., and Woodbourne, N. Y.:

From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne, and return over the same route.

Intermediate and off-route points within 20 miles of Woodbourne.

U. S. District Court, S. D. of N. Y., Filed April 16, 1943.

(6208)

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October, 1942 Term.

No. 1030 65

CRESCENT EXPRESS LINES, INC.,
Plaintiff-Appellant,

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

AND

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION,
Intervenors-Appellees.

Memorandum in Opposition to Motions to Affirm and in Opposition to Statements Against Jurisdiction.

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Supreme Court of the United States

OCTOBER, 1942 TERM.

No. 1030.

CRESCENT EXPRESS LINES, INC.,
Plaintiff-Appellant,

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

AND

HUDSON TRANSIT LINES, INC., and MOUNTAIN TRANSIT CORPORATION,
Intervenors-Appellees.

Memorandum in Opposition to Motions to Affirm and in Opposition to Statements Against Jurisdiction.

This brief is filed pursuant to Rule 12, paragraph 3 and Rule 7, paragraph 3 of the Rules of this Court.

The defendant-appellee, Interstate Commerce Commission and the Solicitor General have served a Motion to Affirm.

The intervenor-appellee, Hudson Transit Lines has served a Motion to Affirm and a Statement against Jurisdiction.

The intervenor-appellee, Mountain Transit Corporation, has served a Motion to Affirm and a Statement making against the Jurisdiction.

This reply brief on behalf of the Plaintiff-Appellant is in opposition to the aforesaid motions to affirm and statements against the jurisdiction.

Appellant in Opposition to the Motion to Affirm Served by the United States of America and the Interstate Commerce Commission Respectfully States the Following:

These appellees apparently concede the jurisdiction of the Supreme Court and only move to affirm upon the ground that the questions raised by this appeal are not substantial.

On this motion to affirm the issue of lack of substantiality is the sole point to be considered and not the ultimate determination of the questions raised by Appellant.

At no point do these appellees show that there has been a determination of the meaning and construction of §203 (a) subdivision 13, §206 (a), §207 (a) and §208 (a) of the Motor Carrier Act of 1935. This appeal seeks as its principal ground a final interpretation of the meaning of these sections. The lower court in this matter attempted to interpret §§206 (a), 207 (a) and 208 (a) of the Act, and in referring to §308 (a) (which is §208 [a] in the official statutes) said that it must be read "quantitatively". That word is not in the statute but the lower court held that to be the meaning of the proviso in §208 (a).

The position taken by the lower court completely ignores §203 (a) subdivision 13 as to the definition of a motor vehicle. That section and §208 (a) must be read together. The definition of a motor vehicle is all inclusive and does not distinguish between different sizes. In view of the fact that the lower court held that Appellant can operate from various terminals under the restriction to door-to-door service, the right and desirability of using different styles and sizes of equipment becomes clearer. If 30 people come to a terminal and their destination at the other end of the line is at a

terminal, it is economically and commercially desirable to transport these people in one large vehicle with 1 driver instead of taking them in 5 seven-passenger sedans with 5 drivers. The right which Appellant asserts under the statute does not prevent Appellant from using small sedans also. Appellant wants to use all types of motor vehicles in economically operating its business. The intervenors who allegedly use buses also use sedans. The Appellant is only supposed to use sedans regardless of its statutory right to use any kind of motor vehicle, or a combination of various kinds of motor vehicles. The lower court seriously erred when it states that a "carrier cannot have power substantially to modify the quality of his service, however free he may be to 'add' to in amount; and certainly nothing can more directly touch the quality of transportation than the cars in which passengers are carried" (p. 6 of typewritten decision).

Firstly, Appellant concedes that it cannot change the type of service conducted by it or its predecessors on June 1, 1935. But the kind of vehicle used does not change the type of service. It may be an improvement in the quality of service but it does not change the type of service. It is unheard of that a carrier cannot improve his service but must be confined to conditions existing on June 1, 1935. There is nothing in the statute to prohibit such an improvement and §208 (a) expressly prohibits any limitation or restriction upon a carrier from adding to its equipment and facilities as the development of the business and demands of the public shall require. The lower court changed the clear words of the statute and interpolates the word "quantitative" into the statute. Under this construction of §208 (a) a carrier can only add the *precise type of vehicle* that it used on June 1, 1935. The statute is now different than when Congress enacted it. §203 a 13 defines motor vehicles to include all types and the proviso to §208 (a) does not say that a

carrier can add only the same kind of equipment as was used on June 1, 1935 but says that a carrier can add to its *equipment and facilities without any limitation, condition or restriction.*

The lower court was in error in saying that the Commission restricted the Appellant to *cars.* The Commission did no such thing. The Commission realized its lack of power to restrict a carrier to one style of vehicle. Its order of September 2, 1941, merely says:

> " • • • limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats. • • • "

Under this clause it is obvious the Commission did not restrict the Appellant to cars or any particular kind of vehicle. It authorized the use of motor vehicles but limited the transportation of more than 6 passengers at one time. If a truck operator used one ton trucks, or did not carry more than one ton at a time on June 1, 1935, it is lawful for him to now use 10 ton trucks to carry 10 ton loads. But in passenger carrier cases, the Commission freezes the carrier to transporting only 6 passengers at a time because on June 1, 1935 it transported only 6 passengers at one time. It is no change in type of service to use a larger vehicle, or to use small and large vehicles interchangeably as the need arises.

A few practical illustrations will show the error even more clearly. There is an extra charge for passengers who want service to or from a terminal or station. Many people are near origin or destination points, and do not need or want the extra service. They go from or to a station. Such people can be carried in large vehicles carrying more than 6 passengers at a time. They do not get

a different service when they go from a station in New York City to a station in the mountain area, or vice versa in a large vehicle or a small vehicle. A carrier could use a bus seating 45 people, or it could use a vehicle seating 14 passengers, such as the vehicles used to take people to and from airports. If we consider these 14 passenger vehicles for the moment, there is no reason for prohibiting the Appellant from using them, and there is no statutory restriction. On the contrary, there is statutory authorization. Congress meant what it said in the statute which is clear and unambiguous. The lower court and the Commission have created ambiguity where none existed.

This motion to affirm points out the very vice which Appellant asserts here. The motion to affirm (at p. 5—typewritten copy) says:

> "Particular objection is made to the restriction as to the number of passengers to be carried. But that restriction is obviously designed, as the District Court states (Finding of Fact No. 8) to restrict appellant to the use of cars capable of carrying not more than six passengers not including the driver—in short, to seven passenger sedans."

That is an admission of the fact that the Commission indirectly wanted to force Appellant to use sedans. The statute gave no such right but the Commission wanted to get that result indirectly and so tried to impose a restriction limiting the number of passengers to be carried at one time. Naturally, Appellant could use a big bus and that is legal and authorized. It becomes illegal only when more than six people are carried. The business of transporting people is not immoral and the number of passengers carried do not and cannot change a legal act into an illegal act *per se*. We stress this point

with all the force we can. This clearly shows we can use any kind of vehicle large or small and not thereby change the kind of service rendered. The restriction complained of is illegal and without statutory authority, and should be set aside.

These appellees assert that the case of *Royal Cadillac Service, Inc.* v. *United States of America No. 423*, October Term 1942, is authority for the proposition that the restriction is proper. This is wholly without merit and the case has no application. In that case the Appellants there asserted that the Commission had based its decision on the change from sedans to busses. The appellees in that case, who are appellees here also alleged in their motion to affirm in that case the following:

> "Appellants contend that the Commission's decision was based solely upon the fact that Royal on March 28, 1939, changed from the use of sedans to the use of busses * * *. However, a reading of the Commission's report is convincing, and the District Court has concluded, that the applications were denied merely because of the change in the nature of the operations and not because of the change in type of vehicle."

In said *Royal* case, the United States of America in its brief before the District Court stated that the Commission did not ground its conclusion upon the change in the type of vehicles used.

Under these circumstances, it lies with poor grace for the appellees to assert that *Royal's* case is applicable to this one, when they stated in that case that the change in type of vehicles was not the basis for the decision. In any event in the *Royal* case there was no ruling by this Court on the merits or any construction made of the law. This Court merely granted the motion

to affirm and such ruling was made on the evidence which was involved in that case, and which is not the same as in this case. In the case at bar, Appellant is objecting to the form of the certificate issued and contending that the Commission has no right to restrict the Appellant from using any type of equipment, whereas in the *Royal* case, there was a ruling on the evidence that there had been a change in the type of operation without regard to the change in type of vehicles used. That is not involved here and does not in any wise constitute a ruling upon the question of law raised by the Appellant in this case, directly upon the issue of the power of the Commission under the statute to directly or indirectly limit Appellant to a particular type of vehicle, or to restrict the Appellant from carrying any particular number of passengers at any one time. In the present motion to affirm this appellee states there is no difference between the two cases but as stated the *Royal* case was held not to involve a construction of the power of the Commission to restrict the carrier to the use of any particular kind of vehicle because the Commission did not put its decision on that ground. In the present case, the question is squarely presented, and in addition thereto, a construction of the statutes is necessary. There has never been an interpretation of these laws and the construction placed upon them by the lower court is different even from the order complained of, because the lower court held that the Commission properly restricted the Appellant to the use of cars, whereas the Commission made no such restriction. The Commission's order of September 2, 1941, merely limited the Appellant to the number of passengers to be carried at any one time. Under these circumstances there is a substantial question of law which must be determined by this Court so that once and for all the power of the Commission to make restrictions with respect to the size of the vehicle

or the number of passengers to be carried at one time will finally be determined.

As stated in the Statement as to Jurisdiction the questions are substantial because the entire industry needs a determination with some finality as to the meaning of these laws. The lower court's construction is not clear, and in any event is incorrect because it reads into the statute, §208 (a) the word "quantitative" as though a carrier could add quantitatively to its equipment and facilities, but only add the same kind of equipment which was used on June 1, 1935, but the statute itself clearly provides "That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities * * *."

That provision is clear and gives the carrier the absolute right to add to its equipment and facilities. Such additions are within the contemplation of §203 (a), subdivision 13 so that any kind of motor vehicle could be added.

In the case of *United States v. Carolina Freight Carriers*, 315 U. S. 475, the "freezing" of a carrier to the single pattern that it used on June 1, 1935 was held to be illegal by this Court. Despite that decision, the Commission and the lower court wanted to freeze this carrier to the use of a particular kind of vehicle by making it illegal to carry more than six passengers at any one time.

The lower court in its decision stated that grandfather operators would be free from all regulation and thereby be a favored group if they had the unlimited power to change the quality of their service (p. 6 of typewritten opinion of the lower court) and that it was safe to say Congress did not intend to go so far.

The difficulty with this statement is that grandfather operators are a favored group and merely have to prove that they operated on the grandfather date and continu-

ously since then. The use of a different type of vehicle does not change the type of service nor does it exempt a grandfather operator from the regulation and control as provided for by the Act. The privilege also of adding to equipment is not reserved exclusively to a grandfather operator but that privilege applies to any carrier to whom a certificate may be issued either under the grandfather clause or under §207 (a).

If we look at this matter from any point of view the issue is of importance and is substantial as to the power of the Commission to restrict a carrier to the use of a particular kind of equipment or the limitation of the number of passengers to be carried at one time. It is respectfully submitted that on this motion to affirm the entire case should not be argued on the merits but should await final disposition and oral argument before this Court. Motions of this kind cannot dispose of issues of law prior to a full and fair hearing on the appeal, and the issue presented of the power of the Commission which was never ruled upon by this Court, and never having been interpreted by any court except the lower court in this case, requires that the Court take jurisdiction of this appeal.

There were a number of other objections made in the lower court by Appellant. The first and most important objection to the order of September 2, 1941 is set forth above with respect to the Commission's limitation of the plaintiff to carrying not more than 6 people. The other objections to the order are set forth in the Statement as to Jurisdiction. These appellees (at p. 6 on typewritten copy of motion to affirm) refer to the limitation to special operations, and for the first time state that the use of the term "special operations" was made because Appellant was found not to be a regular route carrier between fixed termini. The difficulty with this argument is that the words "special operations" have no meaning

whatsoever except to apply to charter operators or to authorize carriers to operate in some special operation as a contract carrier as distinguished from a common carrier. The purpose of the proviso in §207 (a) would indicate that Congress intended that the issuance of certificates should particularly specify routes or fixed termini, except where special or charter operations are authorized. Such a provision covers carriers operating on occasional and sporadic trips to different localities, and certainly does not fairly cover common carriers, operating to and from the same territory daily such as the Appellant. There is nothing special about the operations and the right way to describe the situation is as set forth in §206 (a) where the right to operate is either "over the route or routes *or* within the territory for which application is made." In a grandfather case there is a choice of either of those two alternatives, and has nothing to do with the word "special". A carrier who operates within a territory could operate any where in that territory in any way and without regard to the routes used. Section 207 (a) in referring to special operations, apparently considered that special operations were distinctive and were of the type of charter operations. The lower court treated the words, special operations, as having no other meaning except in contrast to regular routes. An interpretation of §207 (a) on this point is needed.

There does not appear to be any discussion made by these appellees with respect to the limitation to door-to-door service or non-scheduled operations and only slight reference is made with respect to the question raised by the Appellant as to the limitation to irregular routes. The ruling of the District Court in Conclusion of Law numbered "1" that the order supported is by the evidence is a conclusion. Such a conclusion must be reviewed by this Court as to whether the evidence in fact supports it. Appellant does not contend that this Court must substitute its judgment for the Commission's deci-

sion, but at least it must ascertain whether the Commission's order is supported by the evidence and whether the Commission acted within the authority conferred by the statute. Regular route as in the case at bar, constitutes the greater portion of the mileage traversed between Wurtsboro and New York. The fact that passengers were picked up and discharged at places of their own choosing along the route did not change the route to irregular. It is no more irregular than the routes of the New York Central Railroad where its trains go part of the way along the route as the need of business requires. Common carriers by motor vehicles pick up and discharge passengers along the route where passengers may signal, and certainly that would not make the route irregular. The point of pick-up or discharge of a passenger does not determine the route or the regularity of the service on such route, and a carrier has the right to arrange the vehicles and the destination of the vehicles according to the needs of its business.

The last ground raised by these appellees is as to Appellant's claim that there were procedural errors. The Commission had made the order of June 20, 1938 which was similar to a previous order of May 7, 1938 which was the same except in an immaterial way. There was no evidence taken by the Commission to support the order of September 2, 1941 and Finding of Fact numbered "6" so states. The absence of any proof on protestant's part to support the order of September 2, 1941 is an indication that the order of September 2, 1941 is incorrect and that the order of June 20, 1938 should be reinstated because it was issued on the evidence then existing, supporting same. Reference to an alleged new hearing in said Finding of Fact is not supported by the record. However, even if a new hearing had been held, protestants failed to give any proof to counteract the evidence already given by plaintiff's predecessors, and

which was the basis for the orders of May 7, 1938 and June 20, 1938.

Conclusion With Respect to the Motion to Affirm by Appellees, Interstate Commerce Commission and United States of America.

The motion to affirm should be denied and jurisdiction noted because of the need for a construction of the statutes as above indicated, which appellant contends have been incorrectly construed and erroneously applied.

Reply With Respect to Motion to Affirm and Statement Against Jurisdiction of Hudson Transit Lines, Inc., Intervening Appellee.

Firstly, the so-called Statement against Jurisdiction contains no allegation to show lack of jurisdiction. The Statement is merely that the questions are not substantial and therefore need no further argument. The said Statement against Jurisdiction is incorrect and is not entitled to any consideration because it is no different than the alleged Motion to Affirm. Nothing is stated to show that the Court lacks jurisdiction in this matter.

The statements contained in this Motion are disputed by the Appellant. Under its alleged statement of fact this appellee states that the Appellant described its service as a "radial, territorial service" whereas in fact the application form showed the regular route over which operations were conducted. The description of the operations of the Appellant as an interstate livery service is absolutely incorrect because individual fares were paid and the vehicles were destined to different points and places in the mountain area, with passengers going to different points in the same vehicle.

This appellee also assigns as the reason that the Commission issued the order of June 20, 1938 as "error or inadvertence". This is not correct because the same order was dated under date of May 7, 1938 and reissued with a new date on June 20, 1938 so that the Commission had approximately six weeks in which it went over the matter and reissued the order.

At pages 4 and 5 (typewritten copy), it tries to give a history of the uncertainty of the Commission with respect to the proper interpretation of §308a of Title 39 U. S. Code (§208a of the Motor Carrier Act) which indicates that there was strong doubt in the Commission as to the proper construction of the law. That doubt has never been determined by the courts until the present case and even then the determination of the lower court is alleged to be in error, so that a final disposition of the issue by this Court is absolutely necessary. It is somewhat frivolous for this appellee to move to affirm on the ground that the issues raised are unsubstantial, and, in its very motion to affirm claiming that the questions are unsubstantial, it describes the extreme doubt that the Commission itself suffered from trying to make an interpretation of the law.

This appellee refers to a hearing in December, 1938 but there is nothing in the record to support that statement or the fact of a hearing held at that time.

The reference made by this appellee to the *Nudelman* case, 28 M. C. C. 91 and *Sullivan County Highway Lines, Inc.*, 21 M. C. C. 717, is without merit because the facts in those matters were different than in the case at bar.

In Reply to Appellee's "First Issue."

Under this phase of this appellee's Motion to Affirm this appellee asserts that the Commission's interpretation of §308 (a) of U. S. Code Title 39 (§208 [a] of the Motor Carrier Act) is correct and the Appellant's inter-

pretation is without any basis. Strenuous effort is made to avoid the fact that the statute, §208a of the Motor Carrier Act is clear and that Appellant's position is correct. As stated above, the Appellant claims that the Commission had not statutory authority to limit the number of passengers to be carried in any one vehicle. The *Nudelman* decisions, 22 M. C. C. 275 and 28 M. C. C. 91, *Dominic Machise* case, 27 M. C. C. 668, *United States* v. *Maher*, 307 U. S. 148 and *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, cited by appellee, are not applicable because they deal with different types of operations and not such as the one in this case. The *Nudelman* decision was based on the peculiar facts then put in evidence. Even if the *Nudelman* case covered this situation, there were two decisions each arriving at a different result. The first decision held that the Commission could not restrict a carrier to any particular type of vehicle and the second merely held that the restriction could be effected by restricting the number of passengers to be carried.

This appellee places stress upon the case of *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. That case supports Appellant's position that the Commission's order "freezes" Appellant into the precise pattern which existed on June 1, 1935 without regard to the proviso contained in §208a of the Motor Carrier Act. It is not a cause for chaos that Appellant asks for its statutory right to expand. It is chaotic for any governmental commission or board to ignore the statutory restriction on its power, and to indirectly try to secure a limitation of a citizen's rights. This was clearly held by this Court in the case of *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488.

Appellee raises the point that competition would be created. That is no reason for restricting a carrier's rights. This Court in the *United States* v. *Carolina Freight Carriers Corp.*, *supra*, at page 481, said:

> "This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted."

Appellant has the right to use any type of vehicle it wishes under the order of September 2, 1941. Appellee at page 11 of its typewritten Motion to Affirm says this is contrary to the fact. Section 203 (a), subdivision 13 of the Motor Carrier Act and the order of September 2, 1941 are so worded as to support Appellant's position. If Appellant's construction is correct, the Commission's order is shown to be illegal and improper as a matter of law. That in itself proves the need for a final ruling by this Court on the subject. Appellant's position regardless of all other matters is sustained by the wording of §208a of the Motor Carrier Act. At page 10 of this appellee's Motion to Affirm, this is practically conceded because this appellee urges that the "intent of the law may not be defeated by rigid adherence to the strict letter." Such "intent of the law" is a matter which requires judicial construction, and such an interpretation of this statute has never been made by this Court. Appellee cites the decisions of the Commission itself in the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, *supra,* but that cannot bar Appellant's right to have a final Court determination of the meaning of the statute. In those cases the Commission had decided both ways so that it is as plausible that the first decision in each case is as correct as the second one. The lower court in its opinion in the case at bar said in the next to the last paragraph of the opinion:

> "• • • the whole subject was new and confused, and the Commission itself was divided in opinion."

No matter what view is taken ultimately, the subject is new and confused, and a motion to affirm on the ground that question is not substantial is really an effort to deprive Appellant of its right to be heard on the merits by this Court. There is no merit whatsoever in appellee's argument.

In Reply to the Appellee's "Second Issue".

Under this issue, appellee disputes the Appellant's position that the Commission erred in restricting Appellant to door-to-door, irregular route, non-scheduled and special operations.

The Commission can specify the service to be rendered but it must do so correctly, within the statute and according to the evidence. The Commission in this case made two orders on May 7, 1938 and June 20, 1938, on the evidence, correctly deciding the matter and giving Appellant's predecessors the rights to which they were entitled. But the Commission made the order of September 2, 1941 (See Finding of Fact numbered "6" of lower court herein), without any additional evidence to support it. Appellant is entitled to reinstatement of the order of June 20, 1938 on the merits, but on a motion to affirm, it is facetious for appellee to claim the question is unsubstantial.

The restriction to irregular routes is contrary to Finding of Fact numbered "4". Under §206a of the Motor Carrier Act, a certificate can be issued to a carrier who has operated over regular routes or within a designated teritory. No provision is made for irregular routes. The description of irregular routes is contrary to the order of June 20, 1938 (and the order of May 7, 1938) made by the Commission on the evidence and the new order is not supported by any additional evidence (Finding of Fact No. "6"). The statute, §207a of the Motor Carrier Act, bars the issuance of a certificate over

other than regular routes except where the certificate is to cover special or charter operations. Except for such type of operations the certificate must describe regular routes. In the case of operations referred to in §206a the certificate must cover regular routes or the territory within which operations are to be conducted. Under §208a the Commission must specify the routes, the fixed termini, if any, and where operations are not over regular routes or between fixed termini, the territory within which the carrier is authorized to operate. It should be noted that §206a merely refers to two types of service: (1) regular routes and (2) within a territory. Section 208a refers to three types of service: (1) regular routes, (2) between fixed termini and (3) within a territory. It is apparent that if a carrier should operate between fixed termini, and not over regular routes, it has the choice of going between such fixed termini, in any way that it sees fit. The issues presented require an interpretation of the statutes by this Court because Appellant contends that it operated over regular routes between fixed termini and that the statutes have been erroneously construed and applied in this case.

The alleged restriction to door-to-door service is also contrary to the order of June 20, 1938. The lower court in its opinion and Finding of Fact numbered "3" and Conclusion of Law numbered "3" holds that Appellant did and can operate to fixed stations as door-to-door service. In view of the fact that the lower court ruled that Appellant can operate to fixed stations, it is equivalent to a finding that Appellant did operate on June 1, 1935 between fixed stations or terminals. Under §208 (a) of the Motor Carrier Act the Commission must specify the service over the routes, between fixed termini, if any, or within the territory. In this case, the specification is door-to-door service. Appellant said and says now that that specification is wrong. The lower court held that

Appellant may operate from fixed stations. There is no specification in the order complained of, of such fixed terminals or stations and the omission is error. The lower court in making the said Finding of Fact numbered "3" and Conclusion of Law numbered "3" should have sustained the complaint if only to that extent, and struck out that part of the order of September 2, 1941, at the very least.

The appellee says that the restriction to non-scheduled operations was proper. This provision was also different from the order of June 20, 1938 (and the order of May 7, 1938). There is nothing in the act which provides for schedules. Specification of the service to be rendered must be according to the statutory authority. Schedules or lack of schedules do not affect the kind of service to be rendered. It merely facilitates the convenience of passengers. A business operating on a small scale can function casually and without a schedule. When such a business grows and gets more patronage, more formal methods are needed. No change is effected in the type of operation because better and more efficient methods are employed. In this connection, it should be noted that Appellant's operations are not a livery or taxi service. Vehicles are used for different passengers, each going to different destinations, each purchasing separate tickets, and the vehicle is not being hired for the exclusive use of the passenger as in the case of a taxicab livery service. Passengers are transported in both directions in daily operations. It is a restriction made to impede Appellant's growth, and does not specify the service rendered or to be rendered.

The Commission authorized Appellant to conduct special operations. This was objected to by Appellant. It was contrary to the order of June 20, 1938 and the operations were in fact not special operations. The lower court held that the words meant merely irregular route

operations as distinguished from regular route operations. Appellant in its Statement as to Jurisdiction cites the Commission's own decision in *Peninsula Transit Corp.*, 1 M. C. C. 440, 442; *Red Star Sightseeing Lines, Inc.*, 1 M. C. C. 521, 525; and *John G. Schuster*, M. C. C. 106, showing that the Commission construed the words "special operations" as applicable to charter or sightseeing operations. Section 206a or §208a of the Motor Carrier Act do not refer to special operations and there is now an ambiguous situation as to the meaning of the term "special operations". That term must be construed as to its meaning under §207a of the Motor Carrier Act and as to its correct application to the case at bar. The lower court in its opinion said:

> "We interpret 'special • • • operations' in the proviso to Sec. 307(a), as meaning the same thing as 'operations not over specified routes,' just quoted from Sec. 308(a): *i. e.* operations within a defined territory not upon regular routes, or between fixed termini."

Appellant alleges that the lower court's interpretation is different than the Commission's interpretation of "special operations," and to that extent the complaint should have been sustained at the very least. But the construction is wrong. The Commission has interpreted "special operations" as applying to sightseeing or charter operations, and Appellant's business is a regular daily, two way service carrying different people in each direction. If the Commission's interpretation of "special operations" is correct, its application to the case at bar is incorrect and contrary to the facts. If the lower court is correct in its construction, error is still present because operations of Appellant are not over irregular routes, and the lower court even held that

Appellant was authorized to conduct operations between stations and fixed points. See Finding of Fact numbered "3", Conclusion of Law numbered "3". Section 208a distinctly refers to operations between fixed termini, and therefore "special operations" cannot be held to apply to Appellant's rights according to the Commission's application of that term or the lower court's construction of same.

The reference to the case of *Royal Cadillac Service, Inc.*, 63 Sup. Ct. Rep. 158 is inapplicable. The Supreme Court made no decision on the merits in that case because of the facts involved in that case. The Motions to Affirm were granted there and the Supreme Court did not take jurisdiction because the case had become moot by virtue of the subsequent decision of the Commission rendered on September 9, 1942 before the Supreme Court had passed upon the matter. In any event, in the *Royal* case, the Commission had ruled upon the evidence there presented that there was a change in the type of operation which, of course, is not the situation in this case. Therefore that case is not authority affecting any of the issues presented here. In the case at bar, Appellant is raising the question of the statutory authority of the Commission to make the restrictions and also the fact that the order of June 20, 1938 properly described the right to which Appellant is entitled. In the *Royal* case there was no compliance order such as the order of June 20, 1938.

On this Motion to Affirm under these argumentative circumstances which have never been settled finally in any other case by the courts, it is imperative that this Court should take jurisdiction and make a decision which will determine the meaning of the statutes, the power of the Commission to act thereunder and the correctness of the Commission's ruling in the case at bar as it applied to this Appellant.

In Reply to This Appellee's "Third Issue".

Appellant in the Statement as to Jurisdiction has stated that there are no findings of fact to support the order of September 2, 1941 and that there was no proper procedure in support thereof.

This appellee stated that the issue is unsubstantial and cited the case of *Morgan* v. *United States*, 298 U. S. 468, but that case has no relevancy to the case at bar. Appellant alleges that the Commission after taking the proof made the order of May 7, 1938 and then reissued the same order on June 20, 1938. Such two orders correctly describe Appellant's rights and were based upon the evidence before the Commission. Then, without any further procedure, the Commission issued the order of September 2, 1941 without any additional evidence to support the same. (See Finding of Fact, numbered "6".) The order of June 20, 1938 being supported by the evidence should be reinstated because the order of September 2, 1941 has not been supported by any additional evidence. The two orders were issued by Division 5 and therefore there is no legal jurisdiction for Division 5 issuing a different order on September 2, 1941 without any evidence to support the same. The lower court says in Conclusion of Law numbered "1" that the order of September 2, 1941 was adequately supported by evidence. No matter what view the lower court may have taken of this issue, it also found as a fact (Finding of Fact numbered "6") that there was no additional evidence to support the order of September 2, 1941. Under these circumstances, the Commission, no more than any court, can keep changing its orders on the same evidence because to permit such procedure places a carrier in the uncertain position of never knowing where it stands and what its rights are. It is a form of procedure which should be rejected and is not within the scope of the decision of *Morgan* v. *United States, supra.*

With respect to the lack of findings, the Statement as to Jurisdiction shows numerous cases on that issue. Appellee cites *Visceglia* v. *United States*, 24 Fed. Supp. 355, which is not applicable to the case at bar because there, there was a report made by the Commission whereas in the case at bar there was no report. In fact, the defendant, the United States of America and Interstate Commerce Commission, in their Motion to Affirm on page 7 (typewritten copy) state that the Commission "did not issue the customary formal report in this case". The precise form that findings may take is not material but findings of fact such as required by the cases cited in Appellant's Statement as to Jurisdiction should be made and not having been made, the order of September 2, 1941 should be set aside.

Appellee cites the case of *McArthur* v. *United States*, 315 U. S. 787, as authority but that case has no relevancy to the case at bar and was a ruling upon the facts there involved. The promiscuous citing of cases having no relevancy is a burden to the court and counsel.

Reply With Respect to Motion to Affirm and Statement Against Jurisdiction of Mountain Transit Corporation, Intervening Appellee.

In reply to the Statement making against the Jurisdiction and Motion to Affirm of intervenor-appellee, Mountain Transit Corporation, there is nothing in these moving papers showing in any way that this Court is without jurisdiction to review the appeal. The Statement making against the Jurisdiction is therefore without any foundation. The Motion to Affirm in this case tries to argue that there is no substantial question raised. In an effort to establish a lack of substantiality, this appellee is attempting to review the case on the merits prior to a full hearing before the court. That is not the function of a Motion to Affirm. The questions raised by the Appel-

lant require a construction of the statutes in question as set forth above and the right to a proper construction of those statutes and the correctness of their application to the situation in this case cannot be summarily disposed of. This appellee is interposing a brief not to show lack of substantiality but to avoid, if possible, a full hearing on the merits.

There are many statements contained in this Motion to Affirm which are incorrect and a brief reference and denial of these statements are necessary so that an improper impression may not be created. The form of the application blank as filled out by appellant was such as to give the Appellant the right to authority over the regular routes and the indication of a large irregular circle as the area served by it, is of no consequence and was not indicated to mean territory served, but merely to indicate the points and places served.

A card is allegedly quoted as being an advertisement of Appellant's operations but the material part of the card is omitted. The points and places omitted were the various towns and villages served as regular termini and the card itself is a part of the transcript filed with this Court and reference is hereby made to it. It is immaterial on this motion because it does not meet the issue presented with respect to a proper construction of the statutes and their correct application, which can only be determined after a full hearing and after the Court has already taken jurisdiction.

On page 4 (typewritten copy) of the Motion to Affirm this appellee states that exceptions were filed to the order of June 20, 1938 but it omits the fact that in those exceptions it charged that the proof submitted was false and untrue and that it wanted an opportunity to disprove such proof. Such opposing proof was never given by this appellee or its predecessors (see Finding of Fact numbered "6").

An incomplete resumé of the evidence before the Commission is set forth by appellee in paragraphs numbered 1 to 8, and nothing contained therein in any wise disproves the position of the Appellant that it served places on regular routes, and the fact that 7-passenger cars had been used as set forth above has no bearing. In fact, the Commission itself in this case has not restricted the Appellant to cars but merely restricted them to the number of passengers to be transported at any one time. There is no more reason for restricting the Appellant to transporting not more than 6 passengers than there would be to say that Appellant could not transport more than two passengers because there were occasions probably when 1 or 2 passengers were carried on a particular trip. There were occasions when 7-passenger cars had more than 6 passengers, and that condition has been referred to as overloading, but the limitation to 6 passengers has become the key word used by the Commission.

The resumé therefore is not complete but even as given there is nothing therein contained that changes the Appellant's right to a reinstatement of the order of June 20, 1938.

On page 6 of the Motion to Affirm (typewritten copy) this appellee emphasizes the statement "There never was a dispute as to the facts", and even underlines that statement. In its exceptions before the Commission, this appellee under date of June 6, 1938 filed its exceptions wherein it said "That the petitioners are entitled to and seek the opportunity of rebutting and proving the falsity of the statements and affidavits submitted." There never was any such proof given by the appellee or its predecessors and the identical statement was made in the exceptions of Hudson Transit Lines, Inc.

Finding of Fact numbered "6" is a finding of the lower court in this case that no such proof was ever given, even if we assume that there was a hearing in De-

cember, 1938. The statement, therefore, that there was no dispute as to the facts is contradicted by the exceptions filed by appellee's predecessors.

In any event this appellee in referring to the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, shows the extraordinary doubt and uncertainty which existed with respect to the meaning of the statutes and the changes of opinion by the Commission. There never was any court adjudication as to the correctness or incorrectness of the four decisions rendered in the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, *supra*. This Appellant is certainly entitled to an adjudication on the merits after a full hearing where there has been such a history of uncertainty and contradiction.

An attempt is made on the bottom of page 8 of the Motion to Affirm (typewritten copy) to claim that 37 days had expired after September 2, 1941 for the filing of exceptions by Appellant although the order itself had granted 30 days to do so. There is no merit to this contention and it was never raised by the Commission, and the reason why it was never raised by the Commission is the fact that the service of the order itself was not made on September 2, 1941 but was made long afterwards and the filing of the exceptions to that order was made within 30 days.

Rule 101 E of the Rules of Practice before the Commission recognizes this practice and the statement made in the Motion to Affirm is irregular and immaterial and might leave the impression that reconsideration was denied by the Commission because of some technical irregularity, which in fact did not exist.

The opening paragraph under the heading "Argument" filed by this appellee contains two statements, one with respect to an alleged second hearing after June 20, 1938 and the other statement "that after October 31, 1940, at which date plaintiff, Crescent Express Lines, Inc., was

substituted for the partnership that legal objections were made to the procedure of the Commission." The Commission had done nothing to determine the exceptions on October 31, 1940 and nothing was done by the plaintiff until after the Commission made its unannounced and unsupported order of September 2, 1941, and then in opposition to that order this Appellant availed itself of all of the procedure allowed to it and raised all of the points as set forth in the complaint and papers herein. No benefit can accrue to this appellee from this statement except to attempt to becloud the issues which require the interpretation of the statutes and an adjudication as to the correctness of their application.

At the bottom of page 13 and top of page 14 of this appellee's Motion, this appellee says:

> "Protestants had never denied that plaintiff's predecessors were entitled to a certificate of convenience and necessity pursuant to Section 206 (a) of the Motor Carrier Act, but always insisted that in accordance with the provisions of Section 208 (a) the certificate issued should specify the service to be rendered, and, in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate and that, in accordance with Section 207 a certificate should be issued herein for special operations as distinguished from regular route and between fixed termini."

That statement is directly contrary to the exceptions itself. The predecessors of this appellee filed exceptions (copies of which are contained in the transcript) in which the most vigorous opposition was made to the order of June 20, 1938 and if there had been a hearing in December, 1938 as claimed, this appellee and its associate,

Hudson Transit Lines, Inc., failed to offer any proof after having demanded such an opportunity. It is unusual for this appellee therefore to allege that it always conceded the right of Appellant to a certificate. The very paragraph which is quoted above from the Motion to Affirm shows that it was willing that a certificate should be issued and that the certificate should specify the service to be rendered and in case of operations not over regular routes and fixed termini, the territory within which the motor carrier should be authorized to operate. That was not the statement contained in the exceptions, but if it were, it recognizes the fact that there was a claim to regular route operations.

Appellee, at page 15 of the Motion to Affirm (typewritten copy) attempts to explain the delay in issuing the order of September 2, 1941 by stating that "obviously, the delay in issuing a new order after the Exceptions to order of June 20, 1938, was occasioned by the pending proceeding as to the question of law involved." This appellee also tries to discuss the *Nudelman* and *Sullivan County Highway Lines, Inc.*, cases, *supra*, but it should be noted that the Commission throughout the discussion was itself uncertain of the meaning of the law, and the uncertainty has never been passed upon by any court prior to this case. In the face of such a condition to even suggest that the questions raised are unsubstantial and not worthy of argument is frivolous.

On page 19 of the Motion to Affirm (typewritten copy) this appellee says that Appellant should not complain of the lack of a subsequent hearing as the protestants would be deprived of such opportunity to present proof. The difficulty, however, is that the protestants are not appealing and have adopted the order of the Commission and the judgment of the court below as being correct. As indicated above, these protestants demanded the opportunity to present proof, but never gave

any proof assuming even that a hearing was held. The statement is again repeated by this appellee that protestants have conceded Appellant's statements were true. This sentence appears at the end of the first paragraph at page 19 of the Motion to Affirm.

> "The protestants, however, have always conceded that applicant's statements at the informal hearings were true statements as to the facts of operation, but have merely differed on the question of law as to the type of service to be described in a certificate to be issued."

Under paragraph 1 of this appellee's exceptions they stated:

> "The petitioners object to the issuance of any certificate being granted to the applicants because of the fact that on June 1st, 1935 and since that day, the applicants have not been engaged in *bona fide* operation over the route applied for."

Appellee under paragraph 4 of the exceptions also stated:

> "That the petitioners (appellee's predecessors) are entitled to and seek the opportunity of rebutting and proving the falsity of the statements and affidavits submitted."

This appellee, and its predecessors, never conceded Appellant's rights to any kind of a certificate. Now, on this Motion to Affirm it concedes the facts but merely differs on the law. Appellant had received the order of June 20, 1938 which was correct and objected to the order of September 2, 1941 because there had been on evidence or procedure to support it. The making of the order of June 20, 1938 was correct, and in the face of the in-

sistent demand of protestants for a hearing for the purpose of their introducing evidence to disprove Appellant's evidence, it was necessary for the Commission to take proof contradicting Appellant's evidence. There was no hearing, or if there had been a hearing, the failure of the protestants to introduce any additional evidence did not change the evidence theretofore given by the Appellant's predecessors, and therefore it was incumbent upon the Commission to allow the order of June 20, 1938 to remain in full force and effect. Instead of that, the Commission changed the order of June 20, 1938 without any additional evidence and now for the first time the protestants claim that they conceded Appellant's right to a certificate and that there was no issue with respect to the facts established. The reason for this peculiar concession is that protestants, who are now appellees, are satisfied with the restricted order, but the Appellant is not satisfied with the said order or the way it was issued. That is one of the issues in this case and affects the property rights of this Appellant in a very substantial manner. The question is substantial and should be reviewed by this Court.

The citation of *United States of America* v. *Maher*, 307 U. S. 148, 152-153, is without merit because there the carrier was not engaged in operation between the points applied for and the statements made by this Court were based on the evidence presented in that case. In the case at bar there was the order of June 20, 1938 based upon the record and which was supported by the evidence.

Conclusion.

It may be stated that with respect to all of the Motions to Affirm that the appellees do not meet the real crux of this case which is the right of the Appellant to secure a proper and final interpretation of §§203 (a),

subdivision 13, 206 (a), 207 (a) and 208 (a) of the Motor Carrier Act of 1935, and its right to have a judicial review of the correct application of those statutes to the case at bar. These issues are of the utmost importance to the entire motor carrier industry and particularly to the Appellant, because of the doubt and uncertainty which has prevailed concerning the meaning of these provisions of the law. The Commission itself spent several years trying to arrive at a result as to the meaning of the statutes but its interpretation of the meaning cannot be accepted as correct where it has changed its decision in the four rulings in the *Sullivan County Highway* case and the *Nudelman* case.

Under these circumstances, the Motions to Affirm are without merit and the questions raised by the Appellant are substantial and this Court should take jurisdiction of the appeal.

The appellees, Mountain Transit Corporation and Hudson Transit Lines, Inc., in their alleged Statement making against the Jurisdiction present no facts or decisions which can show a lack of jurisdiction in this Court in this matter and such two Statements against Jurisdiction of this Court should be overruled and dismissed.

The Motions to Affirm Should Be Denied.

Respectfully submitted,

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No. 65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CRESCENT EXPRESS LINES, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Brief for Crescent Express Lines, Inc., Appellant.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 65.

CRESCENT EXPRESS LINES, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Crescent Express Lines, Inc., Appellant.

Opinion Below.

The opinion of the District Court (R. 30-36) is reported in 49 F. Supp. 92.

Jurisdiction.

The jurisdiction of this Court is invoked on direct appeal taken under Section 210 of the Judicial Code, Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. C. A. Title 28, Section 47a. The decree of the District Court dismissing the complaint was dated February 27, 1943 and was entered on March 6, 1943 (R. 28).

The order allowing appeal was entered on April 16, 1943 (R. 36). On or about May 7, 1943 appellees, the United States of America and Interstate Commerce Commission filed a joint motion to affirm. On or about May 5, 1943, intervenors, Hudson Transit Lines, Inc., and Mountain Transit Corporation filed statements opposing the jurisdiction of this Court and motions to affirm. This Court, on June 7, 1943, postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 170).

Statement of the Case.

The Appellant and its predecessors prior to, on, and since June 1, 1935 conducted a common carrier business transporting passengers for hire between New York City, N. Y., on one hand, and points and places in Sullivan and Ulster Counties, New York, on the other, traveling via New Jersey. There is no difference between Appellant and its predecessors insofar as operations are concerned and in referring to Appellant's operations it is intended to cover operations by Appellant's predecessors. The operating rights of Herman Trevax *et al.* were transferred to Appellant in October, 1940, and such transfer was made pursuant to the rules and regulations of the Interstate Commerce Commission and the statutes applicable thereto; the Interstate Commerce Commission entered its formal order authorizing substitution of Appellant for its predecessors (R. 112-113).

Appellant in its operations sold transportation to individual passengers going to different destinations in the same vehicle, in the same way that different passengers traveling in the same railroad car go to different destinations. The motor vehicles used were of the sedan or limousine type.

The Interstate Commerce Commission after due investigation issued its order granting a grandfather certificate to Appellant's predecessors on May 7, 1938 (R. 99-100). Thereafter it issued its order dated June 20, 1938 (R. 103-105), making a slight modification but which was in all other respects the same as its order of May 7, 1938. The order of June 20, 1938, was correct and properly described the rights that Appellant was entitled to.

On September 2, 1941 after the lapse of over three (3) years, the Commission without any further evidence, investigations or hearings issued a new order dated September 2, 1941 which is the subject of this action and appeal (R. 115-117).

The order of September 2, 1941 was issued by Division 5 of the Commission and granted a certificate authorizing certain grandfather rights to Appellant, but said rights as granted were different from those granted by Division 5 by its orders of May 7, 1938 and June 20, 1938. The Commission in issuing the order of September 2, 1941 exceeded its statutory powers.

The order of September 2, 1941 is set forth in full (R. 115-117) but the material part thereof which describes the rights granted reads as follows (R. 106-107, fols. 171-172):

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from

June 1, to October 1, inclusive, over irregular routes, * * *."

Appellant objected to the said order of September 2, 1941, and exhausted all procedural steps before the Commission but the Commission failed to set the order aside (R. 158 and 167).

Appellant then brought the present action to vacate, set aside, annul and enjoin the said order of September 2, 1941 (R. 2). The United States District Court for the Southern District of New York made its decree and judgment dated February 27, 1943 entered March 6, 1943 dismissing the complaint with costs, and also rendered its opinion referred to above (R. 28).

Appellant in this Court, as it did before the Commission and in the Court below, alleges that the order of September 2, 1941 is illegal and beyond the statutory power of the Commission, and is contrary to the evidence given by the Appellant only. Appellant objects to said order because of:

1. The limitation of the operating rights so that Appellant should transport not more than 6 passengers in any one vehicle, not including the driver thereof and not including children under 10 years of age who do not occupy a seat or seats;

2. The limitation to door-to-door service;

3. The limitation to irregular routes;

4. The limitation to non-scheduled operations;

5. The limitation or description of the rights authorized as special operations; and because

6. The said order of September 2, 1941 was made without any evidence or procedure to support it.

Appellant's position is that the Commission attempted to restrict Appellant to the use of a particular type of vehicle even though the Appellant had the statutory right to add to its equipment and facilities as the development of its business and the demands of the public might require under Section 208a of the Motor Carrier Act of 1935. In order to effect a limitation or restriction on Appellant's rights to use any type of equipment including buses, the Commission followed the indirect method of limiting Appellant so as to prohibit it from carrying more than 6 persons besides children under 10 years of age who do not occupy a seat or seats.

Appellant does not want or expect this Court to write the form of the order which Appellant is entitled to, or to pass on disputed questions of fact, or to substitute its judgment for that of the Commission. This case involves the power of the Commission to deny to Appellant a statutory right that Appellant has to use any type of motor vehicle, whether a large bus seating 30 or 40 people, or a small bus seating 15 or 20 people, or a sedan or limousine seating 7 or 8 people. Appellant's position appears to be supported by the clear wording of the order of September 2, 1941. The order does not prevent or bar Appellant from using buses or any other type of motor vehicle regardless of size or style; the order only bars Appellant from *carrying* more than 6 people besides children in any one vehicle. The effect of the order circumvented the express terms of the proviso of Section 208a of the Motor Carrier Act of 1935 which is as follows:

> "Sec. 208 (a). Any certificate issued under section 206 or 207 shall specify * * *: PROVIDED, HOWEVER, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or with the territory specified in the

certificate, as the development of the business and the demands of the public shall require.''

Appellant also alleges that the Commission issued its order of September 2, 1941 without any notice to Appellant and without taking any further evidence to support the said order. (See Finding of Fact numbered 6, R. 29.) The order of June 20, 1938 was vacated by the order of September 2, 1941 (R. 116) but no hearing was had or evidence was given to justify the issuance of the last order. The orders of May 7, 1938, June 20, 1938 and September 2, 1941 were issued by Division 5 of the Commission. The Appellant respectfully submits that the orders of Division 5 dated May 7, 1938 and June 20, 1938 were surely supported by the evidence before the Commission, so that the change made by the Commission on September 2, 1941, required evidence to be taken to support that order. The lower Court expressly found that no additional evidence had been taken (Finding No. 6, R. 29). The serious error that the lower Court made is in finding that notice of a hearing after June 20, 1938 had been given. There is nothing in the record to support that finding. In fact, the possibility of a hearing is negatived by the facts. Protestants were demanding a hearing by their exceptions in order to prove that the order of June 20, 1938 was incorrect and erroneous and that the witnesses in support of the application gave false evidence (R. 102 and 109). Now, if a hearing had been held after June 20, 1938, the protestants were required to establish by *evidence* that testimony given in support of the application was false and untrue *but no evidence was taken in support of the order of September 2, 1941* (R. 29). Appellant, therefore, submits that the order of September 2, 1941 was unjustified from the point of view of procedure, and was given without evidence to support it. This subject will be discussed *post* under Point VI.

The other grounds of objection to the order of September 2, 1941 are that the Commission improperly described the rights granted as being special operations in a door-to-door service over irregular routes in non-scheduled service. These terms were incorrect because the Appellant's predecessors operated between fixed termini in a two-way service, in an area which has only one road so that routes could not be irregular. The operations conducted carried passengers paying individual fares and going to different points of destination en route. Passengers did not charter an entire vehicle to make a trip. The lower Court specifically stated in its opinion and findings that service could be given from offices, which are terminals (R. 35; Finding of Fact No. 3, R. 29; Conclusion of Law No. 3, R. 30). The restriction to non-scheduled service is without foundation and is contrary to the statute. Under Section 208 (a) of the Motor Carrier Act of 1935 a specification of the service to be rendered does not cover scheduled or non-scheduled route service and in issuing certificates to carriers using buses, the Commission does not specify that their service shall be scheduled or non-scheduled. The lower Court referred to the Commission's use of the term "special operations" as meaning the same as irregular routes although the reason for using two terms to mean one thing is open to inquiry.

The lower Court dismissed the complaint on the merits with costs although the lower Court admits in its opinion that the "whole subject was new and confused and the Commission itself was divided in opinion," and expressly supports the Appellant insofar as Appellant claimed the right to serve terminal or station points (R. 35). The Conclusion of Law No. 3 (R. 30) preserved that right claimed by Appellant. The complaint should not have been dismissed if the lower court granted any modification

of the Commission's order of September 2, 1941, because to that extent at least the Appellant was successful.

1. Questions Presented.

1. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the operating rights of the Appellant so that the Appellant should transport not more than six passengers in any vehicle, not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats.

2. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the right granted to door-to-door service.

3. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the rights granted to irregular routes.

4. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the rights granted to non-scheduled operations.

5. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 describing the rights granted as special operations.

6. Whether the Commission was correct in making the order of September 2, 1941, without having any evidence given by protestants to contradict the appellant's proof, so that the exceptions (R. 101 and 107) filed by the protestants (intervenors-appellees here) were wholly unsupported by evidence.

2. Opinion and Decree of the Court Below.

The lower court made its Findings of Fact (R. 28-30) and Decree (R. 28) and its Opinion (R. 30-36).

The lower court in the said decision and findings of fact has taken a position beyond that taken by the Interstate Commerce Commission. The Interstate Commerce Commission did not restrict or limit the type of vehicle to be used by the Appellant, but restricted the Appellant to transporting not more than six people at any one time besides children. The *effect* of the Commission's order resulted in a restriction on the type of equipment used as it would be unprofitable to operate 12, 20, 30 or 40 passenger vehicles with only 6 people in it. The lower court in its findings of fact made, Finding No. 8 (R. 29) reading as follows:

> "8. The certificate restricts the plaintiff to the use of cars, capable of carrying not more than six passengers, not including the driver and children under 10 years of age who do not occupy a seat or seats."

There is nothing in the Commission's order which in anywise supports this finding of fact. The order of September 2, 1941 specifically provides that the Appellant shall not transport more than six people without mentioning any type of motor vehicle. As will be indicated *post*, the Commission circumvented the statutory restriction on its power contained in the proviso in Section 208a of the Motor Carrier Act of 1935.

The Court in Conclusion of Law No. 2 at R. 29 states:

> "2. The Commission lawfully restricted the equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935:"

There is nothing in the statutes themselves that justified the Commission or the lower Court in restricting the

right of the Appellant under the proviso of Section 208a of the Motor Carrier Act of 1935 to unlimited expansion and use of any kind of motor vehicle.

The lower Court in its opinion (R. 34, fol. 57) said that the purpose of Congress in the enactment of the grandfather clause was anamolous in giving grandfather certificate carriers the privilege of "indefinite quantitative expansion" and that "* * * possibly Congress did not realize that it was going as far as it did." The lower Court erred in making that statement because *Congress deliberately intended that there should be an indefinite, unlimited right of a carrier to increase its equipment and facilities without any restriction.*

The proviso contained in Section 208a was inserted by the Senate Committee *79 Cong. Rec. 5663.* See *A Legislative History of the Motor Carrier Act of 1935* by Warren H. Wagner, page 53. There is no claim by the Appellant that it has the right to change the type of service rendered on the grandfather date, June 1, 1935, but the Appellant vigorously asserts the right to the use of any motor vehicle regardless of capacity and to carry more than six passengers therein, and protests against the act of the Commission in avoiding the prohibition contained in the statute against restricting appellant's equipment indirectly, by limiting the Appellant to the transportation of only six passengers at one time. The lower court (R. 34) said that however free a carrier may be to add to his service in amount that the type of vehicle affects the quality of transportation. If the Appellant had used a vehicle of an uncomfortable and undesirable style on June 1, 1935 and thereafter as a result of scientific improvement, or the natural development of the motor vehicle industry, was able to secure comfortable vehicles, the *quality* of the service would be improved, and even though improved, would not constitute a change in the type of service. It is the privilege that a

carrier has under Section 208a to improve and expand its service, and certainly Congress never intended that a carrier or the public should be condemned forever to the precise type of vehicle used on June 1, 1935 because any change in the type of vehicle, according to the lower Court's opinion, would be a change in the type of the service. The statute does not make quality of service a test and the lower Court was in error on this point. The lower Court in Finding of Fact No. 3 and Conclusion of Law No. 3 (R. 29, 30) held that the Appellant is entitled to operate between stations or offices. In doing so, a passenger who is transported between an office at the point of origin to an office at the point of destination, is transported no matter what kind of vehicle is used and if a commodious vehicle such as a bus is used, the type of service is not changed. The lower Court in its opinion (R. 34) said that a commodious motor bus capable of seating 40 or 50 passengers would be unwholly unsuitable. There is nothing in this record whatsoever to support such a statement in the lower Court's opinion. Operation between an office, which is a terminal, in New York City to an office or terminal in the mountain area is served equally well by any type of motor vehicle. The entire purpose of the Commission was to restrict a carrier such as the Appellant from using a different type of vehicle than was used on June 1, 1935, although the use of a different vehicle would in no wise change the character or type of the service rendered on, and since, the grandfather date.

Other phases of the lower Court's opinion are discussed under respective points.

Specification of Errors to Be Urged.

Appellant intends to urge all of the errors assigned in the Assignment of Errors (R. 37).

The lower Court erred herein:

1. In making Finding of Fact numbered "6" insofar as it states that the Commission gave notice to the plaintiff of a new hearing, in the absence of evidence of what said new alleged hearing consisted of, and in the absence of any evidence by protestants being given on such alleged hearing in opposition to the order of June 20, 1938.

2. In making Finding of Fact numbered "7" that the certificate issued on September 2, 1941 "specifies" the service rendered by the plaintiff and its predecessors as of June 1, 1935.

3. In making Finding of Fact numbered "8" in finding that the certificate restricts the plaintiff to the use of cars capable of carrying not more than six passengers not including the driver and children under 10 years of age who do not occupy a seat or seats.

4. In making Conclusion of Law numbered "1" that the order of September 2, 1941 was adequately supported by evidence.

5. In making Conclusion of Law numbered "2" that the Commission lawfully restricted the equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935.

6. In making Conclusion of Law numbered "3" that the restrictions in the certificate upon the plaintiff's services to non-scheduled operations, the authorized route as "special and irregular" and the service as "door-to-door," were lawful.

7. In making Conclusion of Law numbered "4" in dismissing the amended complaint upon the merits with costs.

8. In making the Decree and Judgment herein dismissing the complaint in that the same are contrary to law, contrary to the evidence and contrary to the Findings of Fact and Conclusions of Law.

Summary of Argument.

The position of the Appellant in this matter falls into three parts. The Commission was without power to restrict the Appellant from carrying more than six passengers at one time. In view of the statutory restriction on the power of the Commission contained in Section 208a of the Motor Carrier Act of 1935 the Appellant contends that the Commission cannot indirectly force a limitation of the kind of vehicle to be used by restricting the number of passengers to be carried. The lower Court erred in going beyond the Commission's decision stating that the Commission was right in restricting the Appellant to cars (R. 29) where even the Commission made no such restriction.

The second principal phase of the Appellant's position is that the record does not support the Commission in restricting the Appellant to door-to-door service over irregular routes in non-scheduled operations, which were described as special operations. Appellant is fully aware that this Court will not write the form of certificate needed, but will leave the same to the Commission. *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489. It is the function of the Commission to write the form of certificate provided that in so writing it, the Commission does not exceed its statutory power or disregard the facts. The Commission itself interpreted special operations as meaning charter operations going to different points over irregular routes whereas in the case at bar, operations were always between New York City, on one hand, and points in Sullivan and Ulster Counties

on the other. There is nothing special about it as the passengers purchased individual tickets and paid individual fares and were transported to different destinations. The lower Court held that the Appellant had the right to operate between fixed stations, which are fixed termini, and to operate between them is further evidence of the fact that Appellant was entitled to a certificate authorizing operations between such fixed termini rather than a door-to-door service. The distinction made by the lower Court (R. 35) that the fact that passengers were picked up and set down at places of their own choosing made the whole route irregular, is not correct because any motor carrier stops upon request to pick up or discharge passengers. The route does not become irregular because some passengers get off before going all the way to an office or terminal, or if they board the vehicle en route. All motor carrier transportation gives a flexible service where passengers can flag a vehicle and get aboard to be transported. Such occasional passengers do not create a different type of service so as to change an operation over regular routes into an operation over irregular routes. Please note that Section 208a of the Motor Carrier Act of 1935 specifies three types of service (1) over regular routes, (2) between fixed termini and (3) territorial service. The Commission has been incorrectly treating the first two classes as though a carrier had to operate over regular routes in order to operate between fixed termini. The findings of fact and conclusions of law made by the lower Court show that Appellant operated to and from stations or offices which are fixed termini but the Appellant was denied relief. The routes could not be irregular because up to Wurtsboro there is only one road (Finding of Fact No. 4, R. 29), to wit, Route 17, which continues on past Wurtsboro, to Monticello, Liberty and Livingston Manor, where most of the business is done. The

fact that all the vehicles did not go to the end of the line did not make the route irregular. Vehicles went to different destinations and between such points and points of origin the route was regular and not irregular.

The third phase of the Appellant's position is that the Commission changed its order of June 20, 1938 without any procedure or evidence to justify such change and without notice. The order of June 20, 1938 had been preceded by an earlier order on May 7, 1938, substantially the same in form (R. 99-100). The order of June 20, 1938 (R. 103-105) was thereupon issued and without any further procedure the Commission made the order of September 2, 1941. In the Motions to Affirm the intervenors, Mountain Transit Corporation and Hudson Transit Lines, Inc., state that there never was any question as to the facts. Mountain Transit Corporation was the successor to Yelloway Transportation Corporation, *et al.*, which filed exceptions to the order of May 7, 1938 and which exceptions are set forth at R. 101-103. In those exceptions the Appellant's proof was disputed and charges were made that the proof offered by Appellant's predecessors was false, and that an opportunity was desired to prove the falsity of the Appellant's proof. Thereafter the order of June 20, 1938 was issued and exceptions were filed by Hudson Transit Lines, Inc. (R. 107-109), and the same charges were made and a request for an opportunity to prove the falsity of the statements contained in Appellant's proof. No further hearings were had and no proof was given. The lower Court made Finding of Fact No. 6 (R. 29) that no additional evidence had been taken in support of September 2, 1941. There was no evidence to support the lower Court's statement that the Commission gave notice to the Appellant of a new hearing. If there had been a new hearing as the lower Court found, the exceptions filed by Mountain Transit Corporation's prede-

cessors to the order of May 7, 1938, and the exceptions of Hudson Transit Lines, Inc., to the order of June 20, 1938, were not supported by proof having been given by either of these protestants; the record remained in *status quo*, and surely did not support the revocation of the order of June 20, 1938 without additional evidence to sustain the order of September 2, 1941.

The Commission itself has been changing its decisions on its power to restrict a carrier to one type of equipment and the lower Court in its opinion said that "the Commission itself was divided in opinion" (R. 36). There has never been a final court adjudication with respect to the power of the Commission under the applicable sections of the Motor Carrier Act. This case for the first time presents the matter for adjudication.

1. Statutes Involved.

The statutes involved are as follows: Section 203 (a), Subdivision 13 of the Motor Carrier Act of 1935:

> "(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 206 (a) of the Motor Carrier Act of 1935:

> "No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the

Commission authorizing such operations: *Provided, However, That,* subject to section 210, if any such carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in *bona fide* operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, * * *."

Section 207 (a) of the Motor Carrier Act of 1935:

"Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Section 208 (a) of the Motor Carrier Act of 1935:

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6): *Provided, however,* That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

ARGUMENT.

POINT I.

The restriction to transporting not more than 6 passengers besides the driver and children is contrary to the statute and is illegal and unlawful.

The phraseology of the order of September 2, 1941, is an attempt to get around the express wording of Section 208a of the Motor Carrier Act of 1935. Appellant contends that the Commission has no statutory power to restrict Appellant from using any type or size of motor vehicle which it desires to use, and that the statutes applicable expressly give Appellant that right, and expressly limit the Commission's power to restrict such right.

At the outset, Appellant states that it used motor vehicles in its operations. These vehicles were of the sedan or limousine type seating 7 persons. The order of June 20, 1938 did not restrict Appellant to any particular type of motor vehicle, directly or indirectly. The order which is the subject of this action has ignored the statute applicable by making the restriction prohibiting the Appellant from transporting more than 6 persons at any one time.

The appendix to the order of the Commission dated September 2, 1941 describing the rights granted reads as follows (R. 106-107):

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle,

but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1, to October 1, inclusive, over irregular routes, * * *."

Section 203 (a), Subdivision 13, of the Motor Carrier Act of 1935 defines a motor vehicle as follows:

"(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 208 (a) of the Motor Carrier Act of 1935 provides as follows:

"Any certificate issued under sections 206 or 207 shall specify * * *: PROVIDED, HOWEVER, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

The Commission by restricting Appellant to the transportation of not more than 6 passengers besides children has indirectly restricted and limited the Appellant from using any type or size of motor vehicle even though such motor vehicles fall within the statutory definition under Section 203 (a), Subdivision 13. It is to be noted that the restriction in the Commission's order of Septem-

ber 2, 1941 does not prevent Appellant from using any kind or size of vehicle, but merely restricts Appellant from transporting more than 6 passengers in the vehicle used. This is very peculiar because it permits the Appellant to use a bus seating 40 people but prevents the plaintiff from filling the seats in excess of the maximum 6. Inherent in the very restriction is the recognition that the type or size of vehicle could not be limited or restricted as set forth in Section 208 (a) of the Act. The Commission has attempted to circumvent the statute by preventing the transportation of more than 6 persons at one time.

The *issues*, therefore, are very clear; that is whether the Commission has the power to restrict a carrier to one particular size of vehicle, and whether it has the right to do indirectly what it could not do directly. The law itself specifically recognized that all motor driven vehicles should be treated alike and to prevent any restriction of the use of different or larger type vehicles, made the definition of a motor vehicle all inclusive so as to cover all types of motor vehicles.

The first principal stop after leaving New York City enroute to the mountain area, is Wurtsboro which is about 85 miles from New York City. Roscoe, the furthest point, is about 125 miles from New York City. The tariff filed by plaintiff provides for a charge of ½ fare for children from 5 to 12 years of age. These children are entitled to a seat for a trip of 85 to 125 miles. The order, however, prevents Appellant from transporting more than 6 passengers and children under 10 years of age who do not occupy seats in any one vehicle. The order does not take into consideration a situation where 6 adult passengers seeking transportation bring with them one or more children each, all of said children being from 5 to 10 years of age. It would be physically impossible to use a small vehicle seating only 7 passengers with a group of 6 adults and several children. If Appellant

were to use larger equipment so as to accomodate these additional passengers safely and comfortably and in a manner proper for human beings, this Appellant would be prevented from seating the children, or from using the additional seating capacity of such equipment for additional fare-paying passengers. At this point we reach an impasse. It would not be an answer to say that Appellant should run more small size vehicles, because the labor and fuel costs are almost the same for a heavy limousine vehicle as it is to operate a larger vehicle seating 30 or 40 passengers. It is no answer to say that Appellant should refuse transportation because as a common carrier it would be illegal and unbusiness like for it to do so. The present war conditions emphasize the need for group transportation as an economical and proper method of carrying passengers, and it was the clear statutory intent that the Commission should not limit or restrict a carrier in any way from using various types and sizes of equipment.

To permit such a restriction would be an unlawful discrimination. It is not a reasonable classification because the Commission does not require carriers who used 29 to 33 passenger vehicles to continue to use 29 to 33 passenger vehicles, nor does it restrict or limit carriers using 29, 33 or 40 passenger vehicles from using smaller size vehicles, or limit them to the number of passengers transported at any one time, so that we have a clear discrimination applied against carriers who used small size vehicles on the grandfather date.

Appellant further submits that all motor vehicles regardless of seating capacity fit the statutory description of a motor vehicle set forth in Section 203 (a), Subdivision 13. A vehicle must be safe and comfortable and if the public needs and requires better and larger equipment, an operator should supply same. It would be unusual to require an operator to provide less suitable

equipment than is necessary just because equipment which was used on June 1, 1935 has become inadequate due to subsequent conditions. An applicant does not enlarge his franchise by using larger pieces of equipment and the Motor Carrier Act does not prohibit a carrier from using larger or smaller vehicles than that used on June 1, 1935, the grandfather date.

The Commission in the present instance has tried to "freeze" the plaintiff to the use of sedans because sedans were used by it on the grandfather date. This is directly contrary to the statute and is illegal and void.

In *United States of America* and *Interstate Commerce Commission* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, the Supreme Court said:

> "Its prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights."

In *Alton R. R. Co.* v. *United States*, 315 U. S. 15, the Court held that conditions of operation existing on June 1, 1935 were not to delimit operating rights to said date.

Applying these cases to the case at bar, this Court should not allow the Commission to "delimit" the plaintiff to the exact type of equipment used by it on the "grandfather" date and to "freeze" it to the use of such equipment, or allow this result to be accomplished by the indirect method of limiting the number of passengers to be carried at one time.

The Commission has attempted to justify its avoidance of the proviso of Section 208 (a) by advancing the argument that it is not limiting a carrier to any type of equipment or quantity of equipment, but that it is only describing the service to be rendered by such carrier. In making such description however the Commission describes, fixes and "freezes" the carrier to one type of equipment.

The Commission's restriction limiting transportation to 6 passengers has no legal justification. It is contrary to the statute as above indicated. An operator can use 12 passenger sedans. Why restrict it to 6 passengers? Why not 12 passengers? Why not 29 passengers. The Commission has attempted to overcome the restrictions placed upon it by the statute. It has read into the statute a new limitation. It has no such power and by the order in question the Commission has abused its power and has fixed upon the Appellant an unlawful restriction which should be vacated, set aside and annulled.

The lower Court in this matter went far beyond the Commission's order of September 2, 1941 and made Finding of Fact No. 8 and Conclusion of Law No. 2 (R. 29).

The lower Court made Finding of Fact No. 8 as follows (R. 29):

> "8. The certificate restricts the plaintiff to the use of *cars*, capable of carrying not more than six passengers, not including the driver and children under 10 years of age who do not occupy a seat or seats." (Italics ours.)

The lower Court made Conclusion of Law No. 2 as follows (R. 29):

> "2. The Commission lawfully restricted the equipment and facilities of the plaintiff in accord-

ance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935."

It is, therefore, obvious that the lower Court apparently failed to note that the order of the Commission dated September 2, 1941 did not restrict Appellant to the use of any kind of vehicle. The order of the Commission was designed to effect such a restriction indirectly. Congress did not intend that the *status quo* existing on June 1, 1935 insofar as the kind of equipment was concerned should be forever frozen without regard to future development.

The amount of service can be increased by more vehicles or by the use of vehicles having a larger seating capacity. There was no justification on the part of the lower Court to interpolate into the statute the word "quantitative" so that the increase in facilities under Section 208 (a) of the Act would mean that a carrier could increase its facilities only by increasing the number of identical type vehicles used on June 1, 1935. The lower Court, could not increase the restriction which the Appellant sued to set aside. The Appellees did not file any counterclaim asking for affirmative relief on the part of the lower Court.

The lower Court in its opinion said that the Commission would be stripped of all power except to fix routes if it was not permitted to restrict the type of equipment (R. 34). But this is not so. Section 208 (a) states that the Commission shall specify the type of service to be rendered with the restriction that it shall not limit additions to equipment and facilities.

The Interstate Commerce Commission has apparently extended Section 203 (b) of the Motor Carrier Act of 1935 (now Interstate Commerce Act, Section 203 (b) which provides as follows:

"(b) Nothing in this part, * * * shall be deemed to include * * * (2) taxi cabs, cars or other motor vehicles performing a *bona fide* taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini;"

The Commission has applied that part of Section 203 (b) which applies to operations which are exempt from regulatory control under the Act and which are not within the power of the Commission, and applied it to the Appellant, which was conducting a type of business which is within the regulatory scope of the statute. This stretching of the law invades the rights of the Appellant. If the Appellant is of the class of carriers described in Section 203 (b) it has the right to operate without any control whatsoever from the Commission, and can carry 6 or less passengers. If the Appellant is within the scope of the statute, it is entitled to the protection of the proviso contained in Section 208 (a) to add to its equipment and facilities as the need requires, and under Section 203 (a) 13 such motor equipment can be of any type, style or size.

If the Commission desires to have such power in the face of the restriction contained in Section 208 (a) of the Motor Carrier Act, and which has since been reenacted in identical form in Section 208 (a) of the Interstate Commerce Act, 49 Stat. L. 552, U. S. Code Title 49 Sec. 308, the Commission should secure that power from Congress by amending Section 208 (a), rather than by extending its power by so construing the statute as to indirectly effectuate the prohibited result.

The Interstate Commerce Commission has given interpretations of the statute involved on four occasions in the cases of *Matter of Nudelman* and *Matter of Sullivan County Highway Lines.* In the *Nudelman* case, 22 M. C.

C. 275, the Commission first held that it had no power to restrict a carrier to a particular type of equipment which was used on the grandfather date. Thereafter the Commission reversed its decision by a second decision made in the same *Nudelman* case in 28 M. C. C. 91. The second decision of the Commission (one Commissioner out of three dissented) held that a limitation of the size of equipment could be made by the Commission. In the *Sullivan County Highway Lines* case, 21 M. C. C. 717, the Commission first held it had no power to restrict a carrier to one type of equipment, and then reversed itself in the same case in 30 M. C. C. 133, one Commissioner out of three dissenting. We therefore can consider the entire question *de novo* because the uncertainty about correct interpretation still exists until we have a final ruling from this Court on this appeal. The lower Court in its opinion (R. 36), said that:

> "• • • the whole subject was new and confused, and the Commission itself was divided in opinion."

Commissioner Lee dissented from each of the second decisions in the *Nudelman* and *Sullivan County Highway* cases stating that the Commission had no power to restrict a carrier from adding to its equipment, any kind of motor equipment without regard to whether the same type of equipment had been used on the grandfather date.

In the case of *Irving Nudelman Common Carrier Application*, 28 M. C. C. 91, the dissenting opinion of Commissioner Lee is as follows:

> "LEE, *Commissioner*, dissenting in part:
>
> I agree with the conclusions of the majority except for the limitation applying to the maximum number of passengers which may be carried in any one vehicle. With respect to this limitation, I ad-

> here to our original decision in this case, *Nudelman Common Carrier Application*, 22 M. C. C. 275, which followed a similar decision in *Sullivan County Highway Line, Inc., Com. Car. Applic.*, 21 M. C. C. 717. We held that under the proviso of section 208(a) 'we may not restrict applicants to the use of vehicles of the sedan type,' and that 'limitation of the number of passengers to be carried at one time in any vehicle to six would be merely an indirect restriction of the size of the vehicles to be used.' The decisions relied on do not support the position that we have power to impose the limitation. For example, in authorizing the transportation of petroleum products in tank trucks, we do not limit the maximum quantities to be carried in any vehicle, nor do we limit the size of such vehicles."

The number of persons carried on the grandfather date nowhere appears in this case except that 7 passenger cars were used. These cars could carry 8 passengers or even 9 passengers including the driver. The number of passengers carried at one time does not fix the type of service rendered or the manner in which they were transported. Where more people demand more service, the Appellant has the right to provide more service. Such added service can be given in any vehicle so long as the type of service given on the grandfather date is not changed, but the use of a larger vehicle does not change the service. It may improve it but that is not illegal. A truck carrier using a one ton truck on the grandfather date is not prohibited from using a ten ton truck if he needs it in his business; similarly, a passenger carrier may use any size vehicle without limitation. This appeal shows the method used to "freeze" Appellant to one type of vehicle.

The transportation of passengers between a point of origin to a point of destination is accomplished without regard to the size or style of vehicle used, and without regard to whether the style of vehicle used on the grandfather date is continued. Even if the size of the vehicle used on the grandfather date is subsequently abandoned and a different type of vehicle is used no change in the character of the service is effected by a mere change in the type of vehicle used. The carrier under Section 208 (a) of the Motor Carrier Act of 1935 has the right to add to its equipment and facilities as the development of its business and the demands of the public shall require. The decree and judgment appealed from has stripped the proviso of Section 208 (a) of all meaning and has deprived the Appellant of the benefits given thereunder.

This case presents an issue of vast importance to the motor carrier industry of the United States. A number of orders have been issued by the Commission with restrictions, limiting the number of passengers to be transported and the final determination of this case will affect carriers throughout the United States, as well as affecting the future actions of the Commission.

POINT II.

The limitation to door-to-door service is contrary to the opinion, findings of fact and conclusions of law of the lower Court.

The lower Court held that Appellant operated from an office at 169th Street in the Bronx, which is in New York City and could operate from any other office or station (Finding of Fact No. 3, R. 29, Conclusion of Law No. 3, R. 30). The operation between offices or terminals is an

operation between fixed termini. The lower Court in its opinion at R. 35 says that operations between fixed places or offices are really door-to-door. In what respect does any other operation, by buses or other vehicles, operate between fixed termini? All operations between fixed termini operate in the same way, to wit, between terminals or offices at each end of the line. The very findings and opinion of the lower Court establish Appellant's position that the order of June 20, 1938 (R. 105) correctly described Appellant's operations as being between fixed termini and that the order of September 2, 1941, did not correctly describe the rights which Appellant is entitled to, and that the lower Court by its own Findings and Conclusions, and its opinion, was required to sustain the complaint herein in this respect. The decree appealed from cannot stand because it is not supported by the opinion, findings and conclusions. The decree must follow the findings and conclusions, and the failure to do so was assigned as error by Appellant (Assignment of Error No. 8, R. 38).

POINT III.

The inclusion of the words "irregular routes" is incorrect and inapplicable. Appellant operated between fixed termini.

The use of the term over irregular routes by the Commission in its order of September 2, 1941 (R. 117) is incorrect and does not apply to the facts involved in this case. There is only one route between New York City and the mountain area.

Appellant states that in operating between Sullivan and parts of Ulster Counties, which is in the mountain area, and New York City at the other end, that vehicles

must follow the route over the George Washington Bridge or the Lincoln or Holland Tunnels and then along Route 4 and Route 17 New Jersey (formerly Route 2) which connects with Route 17 and then into Sullivan County, and via Route 209 at Wurtsboro to Ellenville and other points in Ulster County.

The change at Wurtsboro is necessary in order to serve the Ulster County area. Vehicles are required to follow Route 17 through Wurtsboro to Monticello, Liberty and Livingston Manor. The fact that all vehicles do not go to the same destination on the same trip does not make the route irregular. Each schedule on each trip may go to different destinations or part way over the route. It is the same as trains which operate on a railroad which do not cover all of the routes on every trip. In fact, a right to operate over irregular routes may be deemed a greater right than a certificate granting regular routes. In the latter situation a carrier is confined to such regular routes whereas in operation over irregular routes a carrier could be free to operate over any route.

Section 207 (a) of the Motor Carrier Act of 1935 states:

> "PROVIDED, HOWEVER, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operation over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

It is, therefore, obvious that the geographical situation in this area compels the use of a regular route or operations between fixed termini. This is especially so as was indicated under Point II herein, that the lower court specifically found that operations were conducted from offices, which are terminals, or fixed termini. Appellant is therefore en-

titled to the benefits of the specific findings and conclusions of the lower Court and the complaint should have been sustained so as to eliminate the description of operations as being over irregular routes and a correct certificate showing Appellant's operations to be between fixed termini as set forth in the order of June 20, 1938 (R. 103-105). The reason that Appellant wants a clear and correct description of its rights even if they may be less than that authorized, is that Appellant wants to continue the type of operations that were conducted on the grandfather date. If Appellant were to continue operations between fixed termini as indicated, it may run the risk of the Commission holding, on some later date, that Appellant has forfeited its rights by becoming a regular route carrier. This was pointed out to the lower Court at the time of the hearing herein and the lower Court in its opinion (R. 35) states that the fear of forfeiture is "fanciful." This fear is not fanciful but is real and apparent. The extent to which the Commission has gone to restrict the Appellant to the use of a particular type of equipment by restricting the number of passengers to be carried, establishes the fact that Appellant has a right to be concerned about the situation. The Appellant should not be placed in the uncertain position where its rights may be jeopardized upon the assumption that nothing will be done to harm Appellant. It should be remembered that the intervenors in this matter will make every effort to harass Appellant and under the circumstances, the Appellant wants exactly what it is entitled to; no more and certainly, no less.

In considering the method of operations to be employed by Appellant, it should be noted that since Appellant has the right to operate between stations or terminals, which are fixed termini, that Appellant may be called upon to carry a larger number of people between a fixed terminal in New York City, to a fixed terminal in

the mountain area, such as Monticello. There being only one road between New York City and Monticello it stands to reason that the one route is followed and will be followed daily in both directions. In the summer time when traveling is very heavy in this area, large numbers of people are transported in both directions, over the same routes, and the order of the Commission which is the subject of this appeal is incorrect and contrary to the evidence, and the lower Court should have sustained the complaint and set the order aside because the operations of Appellant were conducted between fixed termini even if the routes are designated as irregular. See *Alton R. Co.* v. *United States*, 315 U. S. 15, 20, where this Court indicated the Commission can describe service to be over "specified routes *or* between fixed termini." (Italics ours.)

POINT IV.

The limitation to non-scheduled operations is illegal and in excess of the statutory authority of the Commission and is discriminatory.

The statutes, Sections 206 (a) and 208 (a) of the Motor Carrier Act of 1935 as indicated above, do not authorize the Commission to place a negative restriction upon operations.

The Commission has omitted the term "non-scheduled" from the following certificates:

Alfred Koopman, MC 95430, certificate issued on August 25, 1942;
Charles Filler, MC 96100, certificate issued on November 18, 1942;
Samuel Schick, MC 95407, certificate issued on November 26, 1942;

Ben Friedman, MC 95431, certificate issued on July 29, 1942;

George Greenberg, MC 95346, certificate issued on July 29, 1942.

The certificates issued in the above cases by the Commission do not contain restrictions to non-scheduled operations and the form of rights granted in the aforesaid certificates is as follows:

> "Passengers and their baggage, is special operations, during the season extending from the 15th day of May to the 30th day of September both inclusive, over irregular routes, traversing New Jersey for operating convenience,
>
> Between New York, N. Y., * * * Sullivan County, N. Y.
>
> RESTRICTION: The transportation authorized herein is limited to not more than six passengers in any one vehicle, excluding the driver and children under ten years of age who do not occupy a seat or seats."

It can therefore be seen that the Commission itself has omitted any reference in these cases as to scheduled or non-schduled operations and the inclusion of this restriction in the case at bar is discriminatory, unfair and arbitrary. This question has never been determined with respect to the power of the Commission to include the restriction to non-scheduled operations where the statute prescribes the grandfather rights merely to be over routes, between fixed termini or within territory authorized.

The order of June 20, 1938 issued to Appellant's predecessors does not specify non-scheduled or scheduled operations (R. 105). In cases of certificates issued to oper-

ators using buses, the Commission has not specified either scheduled or non-scheduled operations so that the negative restriction inserted in the order of September 2, 1941 of "non-scheduled operations" is improper and is without any foundation in law, or in the evidence to support it.

POINT V.

The limitation or description of Appellant's operations as "special operations" is ambiguous, illegal and void.

The order of September 2, 1941 describing the rights granted as "special operations" is ambiguous. The Commission cannot describe Appellant's operations as "special operations" because there is nothing special about them. Appellant sold tickets to individual passengers and transported them between points of origin to points of destination. There is nothing special about that.

The words, special operations, are really applicable to charter operations where there are special or individual trips made by groups who hire the entire vehicle for an individual trip. In such complete hiring of an entire vehicle there is a special status because of the individual nature of each trip going to a particular destination for the purpose of an outing or for a special purpose. That is not applicable to the Appellant's operations because vehicles are in operation daily to and from the points authorized, and on a daily basis throughout the season authorized, and tickets are sold to individual passengers to be transported in such vehicles. Vehicles are not hired for individual trips such as taxicab trips. There is nothing special about such operations any more than the operations of railroads are special where it operates trains daily and sells tickets to different points.

Appellant objects further to such a description because under Sections 206a and 208a of the Motor Carrier

Act of 1935, Appellant is entitled to a certificate as a grandfather operator and that certificate must specify the rights granted over regular routes, between fixed termini or within a territory.

Appellant is unable to know the meaning of "special operations" and would be placed in a disadvantageous position by being subjected to whatever interpretation the Commission may place thereon at some future date.

The Commission in the case of *Peninsula Transit Corp.*, 1 M. C. C. 440, 442, held that special or charter operations mean:

> "Only those common carriers of passengers who are engaged, or propose to engage exclusively in the transportation of special or chartered parties are required to obtain a certificate specially authorizing such operations."

That case differs from the case at bar because Appellant charges individual fares to each passenger going to a different destination, and passengefs do not charter the entire vehicle.

In the *Red Star Sightseeing Lines, Inc.*, 1 M. C. C. 521, the Commission held with respect to special operations that (p. 525):

> "• • • we conclude that the proposed sightseeing and pleasure tour operations of applicant are special operations within the meaning of that term as used in the proviso to Section 207 set forth above."

At page 526 the Commission said:

> "We find that the present and future public convenience and necessity require the issuance of a cer-

tificate to applicant authorizing it to operate as a common carrier by motor vehicle, in special operations for the transportation in interstate or foreign commerce of passengers and their baggage on round-trip sightseeing or pleasure tours over irregular routes beginning and ending at Broadway and Palmetto Street, Brooklyn, N. Y., with no pick-up or discharge of passengers or baggage at any point * * *."

In the *Red Star* case every one went on the same tour or pleasure trip, starting out and returning together, but the Appellant in the case at bar does not conduct that type of business. Appellant sells tickets to individuals, takes passengers going to different destinations in the same vehicle, takes passengers in one direction, and other passengers in the reverse direction, operates several times daily, and in fact carries on a regular common carrier business which in no respect falls under the attempted description of "special operations".

The Commission in the case of *John G. Schuster* MC 106, decided November 10, 1942 found that that applicant was a common carrier entitled to operate:

> "* * * in special operations on round-trip sightseeing or pleasure tours beginning and ending in Shenandoah, East Mines, * * * with no pickup or discharge of passengers and baggage en route, * * *."

It is therefore obvious that the term "special operations" does not apply to the Appellant because Appellant conducts regular common carrier operations between New York City on one hand and various points and places in Sullivan and Ulster Counties, New York on the other.

Special operations are described in the *Red Star* case, *supra,* and in the *Schuster* case, *supra,* and do not apply to the Appellant's operations.

The lower Court herein in its opinion, in discussing the subject of special operations, used the numbering of the sections in the United States Code, Title 49, and referring to Section 308 said (R. 33):

> "Section 308(a) defines what shall be the contents of such certificates: they must 'specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in the case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate.' (We interpret special * * * operations in the proviso to Sec. 307(a), as meaning the same thing as 'operations not over specified routes,' just quoted from Sec. 308(a); *i. e.* operations within a defined territory not upon regular routes, or between fixed termini)."

It is apparent that the construction placed upon the meaning of the words "special operations" by the lower Court is different that that placed upon it by the Interstate Commerce Commission. Section 207 (a) of the Motor Carrier Act of 1935 provides that any certificate issued shall be over regular routes or between fixed termini "except as such carriers may be authorized to engage in special or charter operations". The Commission in the *Red Star* case and *Schuster* case, *supra,* did not use those words in the disjunctive but applied them together to the type of operations described in the quoted parts of those decisions.

The difficulty with the opinion of the lower Court is that Section 207 (a) of the Motor Carrier Act of 1935 does not apply to the Appellant's operations. The opening phrase of Section 208 (a) reads:

> "Sec. 208. (a) Any certificate issued under section 206 or 207 * * *."

The statute apparently distinguishes between a certificate granted to a carrier under the grandfather clause of Section 206, and a certificate granted to a new operator under Section 207. The lower Court applied Section 207 (a) to the case at bar although it is not applicable.

The Conclusion of Law No. 3 made by the lower Court states that the Appellant has the right to operate from any fixed station in Sullivan County or at any other station, and that, in itself eliminates any possibility of Appellant's operations being special operations (R. 30).

The Commission was in error in calling Appellant's operations special and the lower Court in making the Decree and Judgment appealed from did not follow the Conclusion of Law which it made and which could not possibly support the Decree in this respect.

POINT VI.

The order of September 2, 1941 was made without any hearing or evidence in support thereof.

The lower Court ruled that the Commission gave notice of a new hearing before it changed the order of June 20, 1938 (Finding of Fact No. 6, R. 29). There is nothing in the record to support this statement. The exceptions which were filed by Hudson Transit Lines, Inc. (R. 107-109) and by the predecessors of Mountain Transit Corporation (R. 101-103) specifically asked for the right

to present proof to disprove the evidence given in support of the application by Appellant. Such a hearing has not been held and the absence of proof by protestants corroborates the lack of a hearing. Division 5 made the orders of May 7, 1938, June 20, 1938 and the same Division made the order of September 2, 1941. Such administrative procedure would mean that an applicant would never know what the same Division would hold at some future date upon the same evidence. There must be some fair limit, and the continual change of orders as was done in this case without any further evidence to support the last order unjustly affects the rights of Appellant.

The lower Court in its opinion (R. 36) says that Appellant (plaintiff in the Court below) does not now allege that any other evidence would have changed the result. The fact that Appellant does not offer any proof now does not change the fact that Appellant had the right to rely upon its proof and upon the order of June 20, 1938 and in the absence of any proof by the protestants, the Commission was without justification in revoking the order of June 20, 1938.

The lower Court failed to consider the fact that Appellant was seeking relief in this action and not the Appellees. The protestants who were the intervenors in this case, sought an opportunity to offer proof of claimed false evidence given on behalf of the application. No such proof was given by protestants on such alleged hearing. In the face of such a situation, the Commission was wholly unjustified in ignoring its own order of June 20, 1938 without any further evidence to sustain the new order. See Finding of Fact No. 6 (R. 29).

There is nothing in the record to support the Finding of Fact made by the lower Court in this matter as to notice of a hearing nor is there any evidence that notice

was given to the Appellant of a hearing after the order of June 20, 1938. The effect of the order of September 2, 1941 without requiring the protestants to give the proof they allegedly claimed they had, resulted in the loss by the Appellant of the order of June 20, 1938, without the intervenors supporting their exceptions. A pleading before the Court does not constitute proof by itself, and the failure of the Commission to take proof in support of the exceptions filed by protestants, and changing the order on the same evidence on which the Commission made the orders of May 7, 1938 and June 20, 1938, was erroneous and illegal.

Conclusion.

It is respectfully submitted that this Court should take jurisdiction in this matter because of the vast importance involved in the interpretation of the statutes herein, and because of the unlawful restrictions placed upon the Appellant, contrary to law and contrary to the facts, and that the Decree and Judgment from which this appeal was taken should be reversed and the order of June 20, 1938 reinstated.

Respectfully submitted,

GEORGE H. ROSEN,
Attorney for Appellant.

Dated: October 12, 1943.

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No. 65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CRESCENT EXPRESS LINES, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Reply Brief of Appellant Crescent Express Lines, Inc.

LOEB APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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Reply Brief of Appellant Crescent Express Lines, Inc.

Appellant Crescent Express Lines, Inc., in reply to the briefs submitted by appellees, United States of America, Interstate Commerce Commission, Hudson Transit Lines, Inc., and Mountain Transit Corporation does respectfully allege the following:

In Reply to the Brief of the Appellees, United States of America and Interstate Commerce Commission:

The appellees, United States of America and the Interstate Commerce Commission, served a joint brief in opposition to the brief of the appellant. It is necessary that appellant answer said brief in some detail to prevent any misunderstanding of the issues involved herein.

The case at bar is distinguishable from any other by reason of the fact that the lower Court expressly found

that appellant has the right to operate from fixed stations in the Bronx or elsewhere (R. 30, 35). The lower Court held that service can be made from *fixed terminals*, and that fact is conceded by said appellees in the foot note on page 8 of their brief, and at the same time they contend that we are properly limited to door-to-door service. The right to operate from fixed terminals is one of the material issues raised by appellant, and that right has been sustained by the lower Court although the lower court erroneously dismissed the complaint. Door-to-door service is not a service from terminals as contended by appellant; appellant goes to Court and its right to render a service from terminals is sustained but its complaint is dismissed. WHY? The right to use fixed terminals is an issue in this case, because in connection therewith the right to use larger vehicles becomes more clear. The entire argument made by said appellees as well as the other two appellees, is the special nature of the service alleged to have been rendered by appellant's predecessors in a door-to-door service taking people from their homes to their hotels or vice versa, but the lower Court held with the appellant that its right to operate from fixed terminals is justified. The holding is placed on the ground that terminal service is the same as door-to-door service because it really goes from door-to-door anyway. Appellant claimed and proved that its service was between fixed termini, and therefore the Commission made an error in issuing its order of September 2, 1941, prescribing the authorized service as door-to-door service. The fact that appellant's service was between fixed termini was recognized by the order of June 20, 1938 which properly described the authority to which appellant was entitled.

At pages 9 to 11 inclusive of said appellees' brief there is a recital of the confusion of the Commission in arriving at an interpretation of its power to restrict the right

of a carrier to use any kind of equipment. The recital of the changes of decisions by the Commission does not establish that the final result was correct; it does establish that there is a vital need for a final and definite determination by this Court so that citizens of the United States who are subject to the motor carrier laws can be guided thereby. The statement made in the second paragraph on page 10 that the Commission in the case at bar was merely substituting its conclusions in some other case to the case at bar demonstrates the extent of the error herein. The evidence herein is different from the *Nudelman* case, 28 M. C. C. 91, by reason of the fact that there was no terminal service in the *Nudelman* case and the service was solely confined to a door-to-door service. Any statements made by the Commission with respect to the *Nudelman* case was based upon the evidence in that case, and there is no showing that the evidence in that case is the same as in the case at bar. The concession therefore made by appellees, United States of America and the Interstate Commerce Commission, that the Commission merely substituted its conclusions made in another case, and without any finding of fact that the evidence in the *Nudelman* case was the same as in this case, requires a reversal of the judgment herein.

In Reply to That Portion of Said Appellees' Brief Under "Argument".

In Reply to Point I.

Under Point I of said appellees' brief, they contend that the Commission merely limited appellant to the same kind of service conducted on the grandfather date. In support of that argument they advance the idea that the Commission really did not limit the type of equipment,

but merely described the service to be rendered. Said appellees' entire argument proceeds upon the assumption that the Commission was only concerned with describing the service to be authorized but the difficulty with that position is the fact that the so-called description of the service to be rendered was primarily concerned with the limitation of the right to use any type of equipment on the part of the appellant even though Section 208a of the Motor Carrier Act of 1935 gave the appellant the right to expand and add to its equipment and facilities. Section 203 (a) 13 defines a motor vehicle without reference to size or style. The lower court and appellees try to interpret the proviso contained in Section 208a as though it only gave the right to increase the quantity of the service but that carriers cannot change the type or size of the vehicle from that used on the grandfather date. The construction is so narrow that it requires the judicial interpolation of the word quantity of service whereas the proviso is broad and clear and does not require any judicial interpretation.

We should consider the question of whether the use of different size vehicles is within or without the meaning of Section 208a of the Motor Carrier Act of 1935. Appellant's position is that it has the right to use any kind of vehicle without regard to whether the vehicle was in use or even in existence on the grandfather date, and that the use of larger vehicles does not *per se* constitute a change in the type of service rendered on the grandfather date; further, that the mere fact that appellant's vehicles may have carried 6 or 7 or 8 or less passengers at one time, does not mean that appellant should be limited to that precise number of passengers to be carried in the future. In fact, there is no proof of how many passengers were carried on the critical date of June 1, 1935, and they may have been more or less than 6. The limitation does not establish the type of service rendered

because the transportation of a passenger from the terminal in the Bronx to a terminal at Woodridge in the mountain area is effected by using a small or a large vehicle but the service rendered is the same without regard to what kind or size of vehicle is used. The lower Court even goes to the extent of holding that quality of the service cannot improve above that given on the grandfather date. See page 10 of appellant's main brief. The attention of this Court is called to the fact that the lower Court held that appellant had the right to operate from fixed terminals. There is therefore not even the slightest difference between the operations of appellant from fixed terminals, and the operations of any company using buses from fixed terminals. The service would be the same. That is the key to this case. Even though the service would be the same, the Commission has so drawn the order of September 2, 1941 that even though there is no change in the type of service the appellant is to be "frozen" to the use of small vehicles or at least to the limited transportation of a small number of people. The number of people carried does not establish the type of service. The Commission has not restricted companies which used 29 passenger buses on June 1, 1935, from using 41 passenger buses or from using 20 passenger buses, and the order of the Commission is unjustified in restricting appellant from carrying more than 6 passengers at one time. Trucking companies can use 10 ton trucks, even though they used only 1 ton vehicles on the grandfather date. Appellees and the lower court go upon the assumption that if the Commission cannot restrict the appellant to the use of one type of vehicle all regulation will be destroyed. Frequently when cases come before the courts where the law is clear the Courts render opinions wherein the remedy is stated to be legislative, and that the aggrieved litigant is advised to seek re-

dress by having the statute amended no matter how much difficulty an indibidual would have to go to. In the case at bar Congress enacted Section 208a of the Motor Carrier Act of 1935. The proviso therein is clear; so clear, in fact, that the Commission itself rendered the decision in the *Nudelman* case, 22 M. C. C. 275, and in the *Sullivan County Highway* case, 21 M. C. C. 717, to the effect that Commission had no right to restrict a carrier, directly or indirectly, to the use of one type of vehicle. The Transportation Act of 1940 reenacted Section 208a with the same proviso. After the enactment of the Transportation Act of 1940, the Commission in 1941 changed the *Nudelman* and the *Sullivan* decisions. The reenactment of a statute after a court interpretation thereof is evidence that that interpretation was intended by the legislative body in reenacting the statute. Here we have the clear meaning of Section 208a of the Motor Carrier Act of 1935, in which the proviso referred to was deliberately inserted by the Senate (79 Cong. Rec. 5663) and then the interpretation thereof by the Commission. Congress reenacted the same statute, *and then the Commission changed its decisions.* We submit that if the situation had been reversed that appellees would then contend that the reenactment was intended as Congressional approval of the Commission's interpretation. If the Commission is dissatisfied with Section 208a and if wants more power it will get a much quicker hearing from Congress than an ordinary litigant seeking an amendment of a statute. Appellant must look to the Courts for relief especially where the Commission has exceeded its powers.

At the bottom of page 14 of said appellees' brief they endeavor to explain the incongruous provision of the order complained of with respect to carrying children under 10 years of age, if they do not occupy a seat. The small child sitting on its mother's knee can be carried but the child must be under 10 years of age; in these

times, the Court can take judicial notice that 10 year old children, even 5 year olds, are too big to sit on anyone's lap.

On page 16 of said appellees' brief, third paragraph, is the statement that appellant does not dispute the facts of its operations, but the record is clear that appellant has asserted its clear right to the order of June 20, 1938 and its opposition to the order of September 2, 1941. Appellant has always alleged that the order of June 20, 1938 was the correct description of its rights and there never was any opposing evidence.

The expert opinion of regulatory bodies which the courts are reluctant to disagree with cannot override the clear mandate of the law. The order involved therein is aimed at one thing only, and that is, that carriers using small vehicles on the grandfather date shall be prevented from using larger equipment and so prevent their competing with carriers using buses regardless of the type of service. This is not regulation and is squarely within the decision in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481:

> "This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted."

Appellees place stress upon the decision in the case of *Noble* v. *United States*, 319 U. S. 88. Firstly it involves the limited rights of a contract freight carrier serving a few special types of customers; and secondly, appellant is not restricted to serving only a few special customers but has the right to serve all passengers seeking transportation in a common carrier service.

Reference is made to the case of *Royal Cadillac Service, Inc.*, 317 U. S. 595, at page 20 of said appellees'

brief as being controlling here. That case is not pertinent here because in that case the Commission allegedly placed its decision denying grandfather rights upon the ground that there had been a change in the type of operations after the grandfather date *and not because there had been a change in the type of vehicle used.* The use of fixed termini was apparently not established as in the case at bar, because here the lower Court expressly found that appellant had the right to render a terminal service whereas in the *Royal* case there was no such finding. In fact in the *Royal* case, the Commission and the lower Court found that the use of terminals was different from the service rendered on the grandfather date. This Court in granting the motions to affirm the *Royal* case rendered a memorandum decision which denied review upon the premise that where there is a conflict in the evidence, this Court will not disturb the decision nor will it substitute its judgment for that of the Commission.

The restriction to carrying only 6 passengers cannot find support in the case of *United States* v. *Maher*, 307 U. S. 148, because that case did not even attempt to interpret the provision in Section 208a of the Motor Carrier Act of 1935. At page 21 of said appellees' brief reference is made to that case to justify the imposition of restrictions. In this case, appellant is complaining that the Commission has gone beyond its statutory power and imposed illegal restrictions so that the issue is far different from the *Maher* case. The certificate shall specify the service to be rendered, but even then the Commission has itself been limited by the proviso to Section 208a so that any avoidance of that restriction by the Commission is illegal. Said appellees contend that substantial parity must exist between the operations authorized and those conducted on the grandfather date. That is true but appellant here is asserting that in addition thereto no limitation can be placed upon it restricting an increase

of its operations to any extent so long as the same type of service is rendered. The bulk of the business is done in July and August and is between New York City on one hand and Monticello and Liberty in the Mountain area on the other. The volume is so great that hundreds of vehicles are dispatched daily between these points. In view of the fact that appellant has the right to operate from terminals it can operate between New York City and Monticello and Liberty but subjected to the impossible burden of carrying only 6 passengers. The lower Court erred in dismissing the complaint *in toto* while holding that appellant had the right to operate from terminals (R. 30, 35).

The said appellees refer to the case of *United States v. Maher*, 307 U. S. 148, 155, as holding that actual practice of an industry is a means of construing a statute, but that hardly controls in this case because the Commission itself in interpreting Section 208(a) of the Motor Carrier Act of 1905 ruled that it had no power to restrict a carrier from adding any kind of vehicle to increase its facilities. See *Sullivan County Highway Lines*, 21 M. C. C. 717, *In re Nudelman*, 22 M. C. C. 275. The change of these two decisions by the Commission did not mean that the subsequent decisions were correct interpretations of Section 208(a) of the Motor Carrier Act of 1935.

There is one further matter to answer under Point I of said appellees' brief. Appellees in a footnote on page 24 of their brief discuss the meaning of the descriptive term "special and charter operations" which is apparently intended as a reply to Point V of appellant's brief set forth at pages 35 to 39, inclusive, thereof. The order of September 2, 1941, which is the subject of the within action, described appellant's right to operate as "special operations". Appellant set forth in its complaint paragraph 22 (R. 8) that the use of said term was arbitrary, meaningless and inapplicable, and was vague, uncertain and ambiguous, and was prejudicial to appellant's rights.

The said appellees in the footnote set forth their meaning of special operations and charter operations. A better understanding of the meaning of special operations is obtained by considering what said appellees (p. 24 of their Brief), give as the meaning of both terms:

> "Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier."

The said definition is precisely what the term "special operations" means. It is immaterial whether special and charter operations are one or two types because appellant conducts neither kind. Said appellees fail to point out any error in appellant's position contained in Point V of appellant's brief. Appellant does not rent out entire vehicles to groups such as lodges, bands, etc., to carry them to points of their selection and return; that eliminates charter service. Appellant does not arrange a "particular trip or tour" and sell tickets therefor; that eliminates special operations. Appellant conducts a common carrier service selling tickets to all who buy same, makes trips every day, takes different passengers in one direction and others in reverse direction, takes passengers to different towns en route, and takes them from different

towns en route; charges different fares to each passenger depending on destination and length of trip; in short, there is no difference between appellant's service and that rendered by any other common carrier by rail or bus and the use of the term "special operations" is a misnomer. The lower Court has erroneously interpreted the term "special operations" as meaning operations over irregular routes (R. 33, 35). The lower Court has apparently separated itself from the interpretation used by the Commission, and the error as claimed by appellant is emphasized by the appellees' definition of special operations in their brief on page 24. Appellant's operations are not "special" at all but are plain common carrier operations, heretofore conducted on a small scale, and the natural growth and development thereof is prevented by the application of illegal restrictions and inappropriate and ambiguous terminology.

In Reply to Point II of Brief of Appellees, United States of America and Interstate Commerce Commission.

Under this point effort is made to create the impression that service was radial by referring to the map attached to the supplemental application (R. 49). The territory included in the circle marked on the map consists of a large number of small towns, villages and hamlets. The route between New York City and Wurtsboro is a single road. It is used by all operations without regard to whether the rights issued are described as over regular or irregular routes. At Wurtsboro the main Route 17 continues to Monticello, Liberty and Livingston Manor. At Monticello, Route 42 runs to Woodbourne and then via 52 to Liberty. At Monticello Ronte 17B goes to Maplewood, White Lake, Bethel and Fosterdale. All points along these roads are served. All operators use these roads. Appellant's service to these villages or towns is a service

to fixed termini. The advertisement card (R. 80) clearly shows this although said appellees' brief omits the material section of the card. The entire card in full reads as follows:

7 PASSENGER CARS 7

Leaving daily to all parts of the
MOUNTAINS at lowest prices

Monticello	Liberty	Ellinville
Ferndale	Swan Lake	Kerhonkson
Loch Sheldrake	Fallsburg	Accord
Parksville	Livingston Manor	Kiamicha

FROM YOUR HOME TO YOUR HOTEL

Board and Rooming Accommodating if Desired

Please call to see us at our residence about reservation

Name..... Address.....
Date ..... Time..... Apt.....

CRESCENT MOUNTAIN SERVICE
531 E. 169th St.
Bronx, N. Y.
Tel. JEROME 6-8445-8451
Mountain Tel. Fallsburg 186 W

The villages and towns served are clearly listed by name. To accommodate passengers desiring boarding houses, arrangements could be made through the carrier, but the heavy lines on the card show the difference between service to the various villages and the arrangements that could be made for hotel accommodations. The books of the partnership (predecessors of appellant) in no wise changed the picture. Reservations of space by passengers does not create a different type of service. The

same method is employed by innumerable so called regular route carriers such as Greyhound, All-American Lines and many others. Appellant's predecessors offered sufficient proof to convince Division 5 twice that a proper certificate should be issued and the Commission issued its orders of May 7, 1938 and June 20, 1938 granting a certificate properly describing the rights which should be issued.

The procedure followed by the Commission was irregular in view of the fact that it changed its order of June 20, 1938 without any evidence to justify the change. The lower Court erroneously found that the Commission gave notice of new hearing (Finding of Fact No. 6, R. 29 and R. 31). There is nothing in the record to support this finding. For the first time we learn the basis for this situation in the said appellees' brief at page 27 where reference to the alleged hearing is made as follows:

"See R. 121, 31."

We ask the Court to check R. 121 and 31. At R. 121 there is the unverified Reply to Protest of Mountain Transit Corporation filed October 17, 1941 in which there is reference to an alleged hearing on December 1, 1938. There is no such notice in the certified transcript of the record supplied by the Interstate Commerce Commission to appellant in this case. Based on this unverified paper, the lower Court in its decision at R. 31 refers to the hearing on December 1, 1938. The said appellees, United States of America and Interstate Commerce Commission, do not refer to any other part to support this alleged hearing, and the lower Court in making part of Finding of Fact No. 6 (R. 29) acted without any evidence to justify the finding. The change made by the Commission on September 2, 1941 of its order made on June 20, 1938, was unjustified because there was no evidence to support any change. The exceptions filed by Hudson Transit

Lines, Inc. (R. 107-109) and by the predecessors of Mountain Transit Corporation (R. 101-103) specifically asked for the right to disprove the evidence given by applicant as false and untrue and the printed record containing those documents is in direct opposition to the footnote in the appellees' brief at page 28 that protestants offered no evidence because they were satisfied that "applicant sought only the right to continue its special door-to-door radial, irregular route, territorial operations, conducted with vehicles carrying not more than seven passengers including driver". That footnote is incorrect and the dates of the orders and the date of the alleged hearing conclusively refute said appellees' brief. The order of June 20, 1938 was set aside by the order of September 2, 1941. The alleged hearing is supposed to have occurred on December 1, 1938. At what point and when did protestants hold back their proof that applicant desired to continue operations as a door-to-door radial 6 passenger operator? On December 1, 1938 applicant already had the order of June 20, 1938 and between June 20, 1938 and December 1, 1938 there wasn't the slightest scintilla of anything that would justify the protestants or the Commission in assuming that the order of June 20, 1938 could be nullified so far as applicant was concerned. The exceptions filed by the said protestants demanded a hearing so that they could offer proof of applicant's alleged false evidence and then when the alleged hearing is supposed to have occurred, protestants offered nothing, and the Commission has no record of said hearing. The hearing didn't occur, the lower Court acted without foundation, and now that a restricted order was issued on September 2, 1941 limiting appellant to carrying only 6 passengers, everyone, including the Commission, concedes that appellant is entitled to a certificate limiting it to carrying only six passengers at one time.

The appellees, United States of America and Interstate Commerce Commission, dispute appellant's claim to

regular route operations alleging that it is contrary to the undisputed facts and refer to the application to support their position (R. 43-52). The application is clear.

R. 43: First page shows regular fixed termini.

R. 46: Applicant reserves right to make application for any and all *additional regular* and irregular routes.

R. 47: Regular routes sought.

R. 48: Question III and answer are as follows:

"III.—If applicant (or predecessor in interest) on June 1, 1935, conducted special or charter operations, indicate the territory served and whether such operations have been conducted continuously since. No special operations."

R. 49-50: Fixed Termini—regular routes used and towns served.

Pages omitted are irrelevant to the issue.

At no time did applicant (appellant's predecessors) waive their regular route fixed termini service rights and always asserted full claim thereto. The very application on March 26, 1937 specifically demanded regular routes and if need be additional regular and irregular routes.

In Reply to Point III of Brief of Appellees' United States of America and Interstate Commerce Commission.

Under this point, said appellees aver that appellant has had a fair hearing because it was given the opportunity to submit briefs or petitions for review, and since the Commission denied same that constituted all the hearing needed. Further said appellees contend that even if the Commission changed its mind and issued the order of September 2, 1941 and vacated the order of June 20, 1938, it had that right (p. 32 of said Appellees' Brief).

At the outset, we call attention to the repetition of said appellees at page 29 of the proposition that protestants were not opposed to appellant's receipt of a certificate in limited form. This statement was discussed under Point II, *supra*, and was shown to be contrary to the facts. The exceptions filed by protestants (R. 101-103, 107-109) made no such concession and they always opposed appellant on every issue. There was no hearing on December 1, 1938 because if it had been held, protestants would have given some proof to support their exceptions. The absence of any such proof leaves the exceptions unproved, and certainly did not justify the Commission in setting aside the June 20, 1938 order. The error in procedure occurred on September 2, 1941 because in making the order on that date the Commission did not follow a fair and just procedure. The order of June 20, 1938 had been issued after the exceptions of Mountain Transit Corporation's predecessors had been filed. Please note in treating the exceptions of the protestants, *supra*, the dates of filing were not mentioned. It is important to note same. The order of May 7, 1938 (R. 99) was excepted to by Yelloway Transportation Corporation, *et al.*, predecessors of appellee, Mountain Transit Corporation on June 8, 1938 (R. 101). The order of June 20, 1938 (R. 103) was thereafter issued. The order of June 20, 1938 was protested to by Public Service Interstate Transportation Company and by Hudson Transit Lines (R. 105, 107). The issuance of the order of June 20, 1938 was made despite the objections of the predecessors of Mountain Transit Corporation. The subsequent objections of other objectors to the order of June 20, 1938 filed by Hudson Transit Lines were identically the same as those previously filed by Mountain Transit Corporation's predecessors to the order of May 7, 1938. The order of September 2, 1941 changed the picture without any evidence given to

justify a change. The Commission made up its mind upon the objections of Mountain Transit Corporation and issued the June 20, 1938 order, and those conclusions cannot be discarded upon the mere filing of similar objections.

The appellees, United States of America and Interstate Commerce Commission, apparently concede that the order of June 20, 1938 was correct and properly issued (R. 32) but claim that the Commission could change its mind under Section 221(b) of the Act. Changes of orders can be made but the arbitrary and capricious change of orders without regard to the rights and properties involved and without evidence to justify such action cannot find judicial approval. A change of mind by a Court upon the same evidence is possible under prescribed limits and is not allowed capriciously. Here nothing to justify a change of decision was offered or given by protestants yet the appellant's rights are interfered with to its damage. It is not required that appellant should offer more proof because its proof in sufficient amount was given to justify the order of June 20, 1938 and the burden of establishing the exceptions was on the protestants. They failed to carry the burden and in that situation, the Commission in justice and fairness was required to adhere to its order of June 20, 1938.

In Reply to the Brief of Appellee, Hudson Transit Lines, Inc. Re: Point I.

Under the "Statement of Case," this appellee refers to the incorrect interpretation of the statute in the *Nudelman* case, 22 M. C. C. 277 (p. 3) as though the second decision in that matter reported in 28 M. C. C. 91 was correct. In the face of the Commission's first interpretation as to what Section 208(a) meant, neither decision can really be deemed to be the right decision. It

rests with the Courts in any event to finally adjudicate what the statute means. The Commission's efforts to determine the law were so prolonged that that delay alone does not prove that the subsequent determinations are correct. The statute is clear and the protracted delay is incompatible with considering the later decision as being correct.

On page 4, this appellee reiterates the incorrect statement that the Commission issued the order "based on the uncontested facts in the Crescent application." Appellant has repeatedly pointed out in its main brief and in this reply brief that the exceptions filed by this appellee (R. 107-109) specifically disputed the facts and demanded a hearing. There never was any proof given by this appellee or anyone else to justify the setting aside of the order of the Commission dated June 20, 1938. See Finding of Fact No. 6 (R. 29). Appellant had the right to rely on its order of June 20, 1938 which was issued despite the exceptions and objections which had been filed by the predecessors of Mountain Transit Corporation (R. 101-103) to the order of May 7, 1938 (R. 99). The exceptions and objections of said Mountain Transit Corporation were identically the same as those of Hudson Transit Lines, Inc., and therefore the act of the Commission in issuing the order of June 20, 1938 must be deemed to have been made with full cognizance of the objections made to the issuance of any rights to the appellant. The fact to be considered is that there was no hearing after June 20, 1938, and even if there was, there was no proof given by this appellee to support its exceptions and protest.

The recital by this appellee under the heading of "The Issues" page 5, that appellant wants authority to conduct a type of service never rendered by it on the grandfather date is in error. Appellant wants the type of service which is rendered on the grandfather date and which the Commission twice found that it was entitled to, first, under

the order of May 7, 1938 (R. 99) and then by the order of June 20, 1938 (R. 103-105), and in addition appellant wants its rights granted by Congress under the proviso in Section 208(a) of the Motor Carrier Act of 1935 to add to its equipment and facilities, unrestricted by limitations designed by the Commission to overcome the Congressional limitation placed upon its powers. It is not improper for the appellant, a citizen of the United States, to ask for its statutory rights even though the effect thereof may displease competitors.

The opposition of this appellee is contained in three points. Under Point I, appellee disputes the construction of Section 208(a) of the Motor Carrier Act of 1935, although appellee refers to the section as contained in Part 2 of the Interstate Commerce Act. Appellee contends in substance that no change in the style of motor vehicles is possible and a carrier is frozen to the particular type of vehicle used on June 1, 1935. In this case, appellant does not claim that it can change the type of service rendered on the grandfather date, and that the use of any type of motor vehicle is permissible without regard to the type of vehicle used on the grandfather date. The appellant has the right to expand and to increase its "equipment and facilities." The lower Court has construed Section 208(a) as though the right of expansion is permissible quantitively by adding the precise type of vehicle used on the grandfather date. There is nothing in the statute to justify such a proposition, and to secure such a result, it is necessary to change the clear wording of the statute so that the right of expansion which is unlimited, is restricted to adding only the precise type of vehicle used on the grandfather date.

In order to justify the restriction, appellee claims that the preamble to the Act can be referred to because the preamble suggests that the purposes of the Act are

to foster sound economic conditions. We agree, but sound economic conditions are definitely not fostered by exceeding statutory authority or by disturbing economic conditions by changing decisions so that citizens subject to the Commission's authority are unable to know what rights they have. Chaos does not result from the exercise of statutory rights, but chaos has resulted from the efforts of competitive carriers to impede the development of the motor carrier industry under the authorization permitting expansion.

The proviso contained in Section 208(a) of the Motor Carrier Act of 1935 was intended and was inserted as the result of oversight. See report of Senate Committee, 79 Congressional Record 5663.

Section 203(a) 13 of the Motor Carrier Act of 1935 defines motor vehicles in the broadest possible terms and is all inclusive. Motor service is rendered with motor vehicles of any type which fall within the statutory definition, and the capacity of the vehicles does not indicate the type of service. The attempt to claim that the limitation of the number of people describes the service is a vain one because the type of service is separate from the equipment used. The mere fact that 6 or 7 people were carried on the grandfather date, or even less than that number, does not mean that appellant is to be forever frozen to carrying not more than 6. The appellees all proceed upon the assumption that just because that number may have been carried on the grandfather date that any certificate issued which contains that limitation is justified. This Court in the case of *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 488, expressly held that the Commission should not freeze a carrier into the precise pattern of operations performed on the grandfather date even though the competitive situation which may result is not to the liking of the Commission or the other operators. The issue involved herein

is more important because appellant is asserting that it is entitled to a broader certificate upon the record, and upon the orders issued by the Commission on May 7, 1938 and June 20, 1938 which the protestants did not impeach or contradict by any sworn evidence; and in addition appellant is asserting its right to expand under the express authorization contained in Section 208(a) of the Act. The error of the Commission is obvious and the Court need not be restrained from acting because of any consideration for the Commission's judgment which in the case at bar exceeded the power of the Commission. The case of *Noble* v. *United States*, *supra*, is not applicable because it relates to a freight carrier whereas the case at bar relates to a passenger carrier; there the carrier tried to expand its business beyond that conducted by it on the grandfather date, whereas in this case the appellant does not wish to change the type of operations but wants a reinstatement of the order of June 20, 1938 which correctly described the rights which appellant is entitled to, and the right to expand which appellant asserts is that which is expressly granted by Section 208(a). The difference between the *Noble* case and the case at bar is that in the former the applicant tried to change the type of operations whereas here the appellant wants the right to expand the business which it conducted on the grandfather date and which did not and does not depend on the type of vehicle used or the capacity of such vehicles.

This appellee, like the others, places great reliance on the second decision of the *Nudelman* case, 28 M. C. C. 91, and the second decision in the *Sullivan County Highway* case, 30 M. C. C. 133, although the first decision in each case in 22 M. C. C. 275 and 21 M. C. C. 717 respectively, is just the other way and supports appellant. There is an enormous difference between the case at bar and all other cases cited by the appellees, and particularly different from the *Nudelman* and *Sullivan County* cases. The difference

which we point out is the fact that appellant asserted the right to operate from and between fixed termini and over regular routes as set forth in the order of the Commission dated June 20, 1938. The Commission rejected appellant's demands but the lower Court specifically held that appellant has the right to operate from any fixed stations (R. 31, 35). There is nothing like that in the *Nudelman* or *Sullivan County Highway* cases, yet the Commission took the conclusions arrived at in those cases on different evidence and applied them *in toto* to the case at bar. The lower Court erred in dismissing the complaint because its opinion and findings were different from those of the Commission and to that extent, the complaint was sustained. Operations of the appellant are therefore permissible from stations and that is wholly different from the evidence in any other case and requires that a different rule be applied rather than taking the results of other cases rendered on different evidence and applying same to the case at bar. The Commission in the *Nudelman* case said, 28 M. C. C. 91, 95:

> "Each case, of course, must be decided on its own merits."

But despite that ruling the Commission did not decide the case at bar on its merits, but used the results of the *Nudelman* case. Operations from a terminal such as that conducted by the appellant destroy the entire basis for the limitation of carriage to not more than 6 persons. The service rendered is supposed to be designed to take old, weak, and invalid persons, women and children from the homes to the actual points of destination, and also such others as wanted a service going between points of origin and destination. To this end the Commission said that the service is described by limiting it to carrying only 6 persons at one time. But the appellant operates from sta-

tions or terminals and the lower Court has so found (R. 31, 35). The reason, therefore, for the alleged restriction falls and the restriction itself falls with it. If appellant operates from a terminal there is no need for appellant to carry only 6 persons but is entitled to carry any number. The most casual reading of the decisions in the *Nudelman* and *Sullivan County* cases, *supra*, show this situation, and therefore the terminal operations of the appellant do not provide a so-called personalized service, but renders the type of service properly described in the Commission's order of June 20, 1938 which should be reinstated.

Appellant wishes to stress that passengers using appellant's service purchased individual tickets, traveled to different destinations, different passengers traveled on return trips than those using the vehicles in the first instance, passengers boarded vehicles at terminals and got off at terminals, that trips were made daily in both directions, that special trips or tours were not conducted, but that the business was a regular daily two-way service over regular routes or between fixed termini just as that rendered by any railroad or by any carrier using buses instead of smaller size vehicles.

In Reply to Point II of the Brief of Appellee, Hudson Transit Lines, Inc.

Under this point of appellee's brief said appellee tries to establish that the service of appellant was not over a regular route but was territorial in scope. This subject is discussed in connection with the brief of the appellees, United States of America and Interstate Commerce Commission *ante*. The application filed herein and the supplemental application (R. 43-52) do not support the appellee. As indicated *supra*, the said applications denied that any special service was rendered and described the routes

served. The map was roughly drawn and included all the towns therein indicated. The area served is highly congested during the summer season and every town therein is served and the application was supplemented by advertising such as that shown at R. 80 which specifically named each of the major towns served. The regular routes served are shown by the fixed termini listed in the application (R. 43) and by the denial of conducting special operations (R. 48). There is only one road between New York City and the mountain area which was used on all trips. The case of *United States* v. *Maher*, 307 U. S. 148, does not cover the situation because there the carrier conducted an anywhere-for-hire business making only occasional trips into Washington and in making such occasional trips he used part of a named highway. In the case at bar the appellant conducted operations in a two-way service between fixed stations which the lower Court found, even though the lower Court erroneously dismissed the complaint (R. 31, 35). The dismissal of the complaint is incompatible with the decision and findings of the lower Court, and was assigned as error herein (R. 38 Assignment of Error No. 8).

Appellant's predecessors maintained a terminal in Woodridge (R. 66-67) which is in the mountain area. The lower Court only referred to appellant's New York City terminal at 531 East 169th Street, in the Bronx (R. 31, 35). It stands to reason that the maintenance of at least two terminals at opposite ends of the line proves that operations were between fixed termini and that is just what the Commission found when it made the order of June 20, 1938. The argument of this appellee at page 23 of its brief that appellant can only pick up passengers at a terminal and must take them to a point other than a terminal at the other end of the lines, is preposterous. The existence of at least two terminals establishes the fact that appellant operated over regular routes or be-

tween fixed termini. In this case there is no difference because there is only one road so that operations between fixed termini are operations over regular routes.

There is no comparison between appellant's operations and those of a taxi operator. A taxi operator rents his car to a person making a particular trip to a given destination at his own convenience. It really is a chartering of the entire vehicle by one party. Appellant sells tickets to any one and puts different people coming from different towns in the same vehicle. There is no more community of interest between the different passengers than there is between passengers on a railroad train going in the same general direction.

This appellee, like the others, incorrectly quotes from the advertising card printed at R. 80. That card shows operations to the fixed termini named, that service was daily, and that to those who might desire to secure boarding or rooming accommodations that same could be arranged. At R. 77 the advertising shows that service was daily and that trips were made to and from the mountains. At R. 78 the telephone number of appellant's terminal in Fallsburgh is printed showing that an office was maintained in Fallsburgh which is in the mountain area. No mention is made of any alleged door-to-door service but the advertisements, signs, cards, etc., all show a service to and from the offices of the appellant, which establishes that appellant's predecessors operated between fixed termini.

The affidavits of Mr. Feldman (R. 69) and Adela Dingelthal (R. 73) referred to by said appellee at page 24 do not change the picture at all, but support the appellant's claim to terminal operations between fixed termini.

The scope of the certificate is for the Commission to decide but in this case the Commission and the lower Court acted contrary to the evidence and without evidence to support the order and judgment complained of. In such

a situation, this Court has the power to act and does not substitute its judgment for that of the Commission.

In Reply to Point III of the Brief of the Appellee, Hudson Transit Lines, Inc.

Under this point appellee contends that appellant secured a hearing because it filed various petitions for reconsideration. The issuance of the order of September 2, 1941, without any evidence to support same has already been adequately discussed *ante*. Appellant desires to point out that the lower Court had no basis for finding that notice of a new hearing had been given (R. 29 Finding No. 6, R. 31). Appellant complains that the Commission had no basis for vacating the order of June 20, 1938 and making the order of September 2, 1941 without any evidence to justify such change, especially where the order of June 20, 1938 was issued over the exceptions of the predecessors of Mountain Trainsit Corporation (R. 101).

Reply to Brief of Appellee, Mountain Transit Corporation.

Mountain Transit Corporation, the appellee herein, is the successor to Yelloway Transportation Corporation, *et al.* The exceptions filed by said predecessors of Mountain Transit Corporation (R. 101) are the basis for the opposition of Mountain Transit Corporation herein.

The gist of the opposition of said appellee is the same as that of the other appellees and protracted discussion is unnecessary.

The appellant respectfully submits that the arguments submitted in reply to the briefs of the appellees, United States of America, Interstate Commerce Commission and Hudson Transit Lines, Inc., be deemed in reply to the various arguments of the appellee, Mountain Transit Corporation so as to avoid unnecessary repetition.

CONCLUSION.

The briefs of the appellees do not in any wise change the situation with respect to the correct interpretation of Section 208(a) of the Motor Carrier Act of 1935 which was reenacted under the same number in the Transportation Act of 1940. The appellees proceed upon the assumption that the right interpretation of that section merely gives the appellant the right to add vehicles of the identically same size or type used on the grandfather date. The appellant contends that under Section 203(a) 13 and the proviso to Section 208(a) that it has the right to add motor vehicles of any kind or size which will increase its facilities and equipment within the express authorization of Congress. The type or size of the vehicle does not determine the type of service rendered especially in the instant case where it was found to have the right to operate from terminals (R. 30-35), and that such finding indicates that the operations of the appellant were between fixed termini and therefore the order of June 20, 1938 was the proper order to have been issued herein. Appellant submits that the judgment rendered herein should be reversed and that the order of September 2, 1941, be set aside, and the order of June 20, 1938 be reinstated.

Respectfully submitted,

GEORGE H. ROSEN.
Attorney for Appellant,
Crescent Express Lines, Inc.

Dated: November 18, 1943.

In the District Court of the United States for the Southern District of New York

CRESCENT EXPRESS LINES, INC.,
PLAINTIFF–APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS–APPELLEES

CIVIL NO. 19–339

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted district court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The decree, together with written opinion, findings of fact and conclusions of law, was entered [1] on March 6, 1943. An appeal was allowed on April 16, 1943, and service of the appeal papers was made upon appellees on April 22, 1943.

[1] The decree was actually dated February 27, 1943.

The order of the Commission (Division 5), dated September 2, 1941 (reconsideration of the matters decided therein being denied by the entire Commission on July 13, 1942), granted to appellant a certificate as a common carrier of passengers by motor vehicle under the "grandfather clause" of Section 206 of the Motor Carrier Act of 1935, as amended. However, the Commission imposed certain limitations which appellant contends were not warranted by the Act.

The facts and the issues of law are clearly set forth in the findings of fact, conclusions of law, and opinion of the District Court. On June 1, 1935, the crucial "grandfather" date, appellant[2] was operating a fleet of six sedan motor cars each capable of seating six passengers in addition to the driver. It operated between New York City (the Bronx) through New Jersey to points in Sullivan and Ulster counties, New York within twenty miles of Woodbourne, New York (the Catskill resort country). In some cases it picked passengers up at their houses in New York and dropped them at their hotels or boarding houses in the resort areas and vice versa. In other cases it picked passengers up at an "office" at 531 East 169th Street in the Bronx or at the passenger station in Woodbourne. That part of the route which was between New York City and Wurts-

[2] Actually appellant's predecessor.

boro, New York through New Jersey, was always over the same roads. Beyond that, however, the route was determined by the passengers' destination. Appellant's operations were not upon any schedule.

The Commission, after an informal hearing at which appellant's predecessor presented evidence, issued on June 20, 1938, a considerably broader certificate than the one now under attack. Protests, were, however at once filed against this order by a number of bus lines, and, as a result, further informal hearing was held on December 1, 1938. Appellant's predecessor[3] was given notice of this hearing but did not attend. No new evidence was offered at this hearing.

After reconsideration of the same record the Commission issued the present certificate to appellant. This certificate granted appellant the right to operate between New York and points in Sullivan and Ulster counties, New York. However, it restricted in certain respects the type of service to be performed.

Thus, the certificate limited appellant's service to "the transportation of not more than six passengers in any one vehicle, but not including the

[3] The lower court found (Finding of Fact No. 6) that such notice was given to appellant. Appellant in its jurisdictional statement (p. 13) denies that such notice was given to it. Actually the record shows that a notice of rehearing was sent by the Commission to Crescent Mountain Service, which was appellant's predecessor then operating the business.

driver thereof, and not including children under ten years of age who do not occupy a seat or seats." It also described the service to be rendered by appellant as "door-to-door service,"[4] as being "non-scheduled," and as constituting "special operations" over "irregular routes."

Appellant contended below, principally, that the limitation in these five respects was beyond the Commission's statutory authority. It also urged that the Commission failed to make basic findings of fact, that there was a lack of substantial evidence to support the order, and that the Commission could not modify its earlier certificate of June 20, 1938, without taking further evidence. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The operations of appellant and its predecessor during the "grandfather" period are exactly like those which this Court recently considered in *Royal Cadillac Service, Inc.* v. *United States*, No. 423, this term. The Court there affirmed *per curiam* an unreported decision of a three-judge federal court which had sustained an order of the Commission denying a "grandfather" certificate to Royal Cadillac Service, Inc. That

[4] It is to be noted that the District Court construed the "door-to-door" limitation as not preventing appellant from picking up passengers at its fixed stations in the Bronx or elsewhere (Conclusion of Law No. 3).

company, as the opinions of the District Court and the Commission[5] indicate, during the early part of the "grandfather" period had conducted operations in the Catskill area in seven passenger sedans. These operations, like appellant's, were largely from door-to-door, with no fixed schedule, and following a fixed route for only that part of the journey between New York and Wurtsboro. Because Royal Cadillac subseqeuntly during the "grandfather" period had changed its operations to bus operations on a fixed schedule, between fixed termini, the Commission and the court held that there had been such a substantial change in the nature of the service as to break the continuity[6] of the same type of service required for a "grandfather" certificate.

The only difference between these two cases is that here there has been no change by appellant in the type of service rendered. Consequently, appellant is entitled to a certificate of some type. Appellant's objection to the certificate granted is that this certificate contains restrictions contemplated to prevent it from making, in the future, just such changes in the nature of its service as were made by Royal Cadillac in the past. But,

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[5] The Commission's decision is reported in *Royal Cadillac Service, Inc., Common Carrier Application*, 30 M. C. C. 469

[6] The "grandfather" clause requires that a carrier, in order to secure a certificate, must not only have been in *bona fide* operation on June 1, 1935, but that it also shall have "so operated since that time."

certainly, if the Commission can deny a certificate because of these changes in the type of service during the "grandfather" period, it can also by appropriate restrictions in a certificate prevent the same changes in the future in the nature of the service continuously rendered during the "grandfather" period. The power to impose such restrictions is plainly granted by Section 208 (a)[1] of the Motor Carrier Act, which requires the Commission in granting certificates to "specify the service to be rendered" and the "territory within which the motor carrier is authorized to operate." Under this language the Commission

[1] That section provides as follows (49 U. S. C. sec. 308 (a):

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6); *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

can and must attach limitations, whether geographic or otherwise, to insure the "substantial parity between future operations and prior *bona fide* operations" which the "grandfather" clause contemplates. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 481, 483.

Particular objection is made to the restriction as to the number of passengers to be carried. But that restriction is obviously designed, as the District Court states (Finding of Fact No. 8), to restrict appellant to the use of cars capable of carrying not more than six passengers, not including the driver—in short, to seven passenger sedans. It can scarcely be doubted that such a restriction directly relates to the type of service to be performed. There plainly is a substantial difference in character between the type of operations which may be conducted by a line of light, small, limited capacity passenger cars and those which may be conducted by a fleet of heavy, commodious, large capacity motor busses. Nor does the proviso of Section 208 (a) which forbids limitations restricting the "right of the carrier to add to its equipment and facilities" inhibit the present limitation. That proviso clearly has reference to quantitative rather than qualitative limitations, like the present one, as the District Court and the Commission, elsewhere,* have held.

* See particularly *Irving Nudelman, Common Carrier Application*, 22 M. C. C. 275, 28 M. C. C. 91. In the first deci-

This is well expressed in the following excerpt from the District Court's opinion (p. 6):

"* * * if the holders of such ["grandfather"] certificates have the same unlimited power to change the quality of their service as they have to add to its quantity, Congress, in an effort to prevent the unduly harsh import of a new system, created a favored group of carriers substantially free from all regulations over those routes on which they may have chanced to operate in June 1, 1935. So far at least, it is safe to say that Congress did not mean to go."

So far as the limitation as to "special" operations is concerned, the Commission was required to impose that, under the circumstances here, if a certificate was to be granted at all. Thus, Section 207 contains a proviso "that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carrier may be authorized to engage in special or charter operations." Appellant was found not to be a regular route carrier between fixed termini and therefore this further limitation was necessarily required.

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sion in this case the Commission took the contrary view. On reconsideration the Commission in its second report took the present position. The fact that the Commission was somewhat undecided as to the scope of its powers in this situation, coupled with the large number of "grandfather" cases, explains the delay between the rehearing and the second order in the present case. The District Court so indicates in its opinion, pp. 2, 7.

As to the Commission's findings, while it did not issue the customary formal report in this case, its order contains all the requisite findings. Thus, the second paragraph of the instant order reads as follows:

"*It further appearing,* That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification set forth as appended on the reverse side hereof or attached hereto and made a part of this order; and the Commission so finding; * * *"

The appendix referred to completely describes appellant's operations during the "grandfather" period. Thus, the Commission clearly states the basic, as apart from the evidentiary, facts. This is all that the Commission, under many decisions of this Court, is required to do. *United States* v. *Baltimore & Ohio R. R.*, 293 U. S. 454, 465.

While it was contended in general that there was no substantial evidence to support the order, the District Court specifically concluded to the contrary (Conclusion of Law No. 1). The only specific contention in this connection made on appeal, however, appears to be that since the greater part of appellant's mileage was over a regular route, there was no evidence to support the finding that its operations were over irregular routes (Jurisdictional Statement, p. 10). This contention is well answered by the following statement in the lower court's opinion (p. 7):

"Third: It was also proper to describe the route as 'irregular.' A 'regular' route means one which has only 'fixed termini,' not one which always traverses the same roads for part of its route. The fact that the plaintiff picks up and sets down its passengers at places of their own choosing, makes its whole route 'irregular.'"

The claim that the Commission committed procedural errors is equally groundless. Appellant's predecessor was given ample notice of the rehearing, and the fact that it did not see fit to attend and furnish additional evidence is completely immaterial. The District Court states (p. 7) that "plaintiff * * * does not even now allege that any other evidence would have changed the result." The Commission, like a court, was perfectly free to change its mind in the second order after having reconsidered the original record without taking further evidence. *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215, 218, affirmed October 12, 1942, *per curiam*, No. 113, this term, 63 S. Ct. 31, 152.

For the foregoing reasons it is submitted that the decree of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1030

CRESCENT EXPRESS LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF HUDSON TRANSIT LINES, INC., OPPOSING JURISDICTION AND MOTION TO AFFIRM.

JAMES F. X. O'BRIEN,
Counsel for Appellee, Hudson Transit Lines, Inc.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 19-339

CRESCENT EXPRESS LINES, INC.,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants-Appellees.

MOTION TO AFFIRM.

To: George H. Rosen, Esq., Attorney for Appellant, 302 Broadway, New York, New York.

SIR:

Please Take Notice that the defendant-appellee, Hudson Transit Lines, Inc., does, pursuant to Rule 12, Paragraph 3, and pursuant to Rule 7, Paragraph 4, move to affirm the order and decree of the District Court in the above entitled cause upon the ground that the questions involved in the appeal to the Supreme Court of the United States are so unsubstantial as not to need further argument, and that the Statement as to Jurisdiction filed by the appellant does not

disclose any adequate statement of grounds indicating th
the questions involved are substantial as required by Ru
12, Paragraph 1. In this motion, we shall rely upon t
Statement Against Jurisdiction annexed hereto and file
herewith, and likewise upon the contents of any simil
Statements or Motions made by other appellees herein.

Yours very truly,

JAMES F. X. O'BRIEN,
Attorney for Appellee,
Hudson Transit Lines,
17 Academy St., Newark, N. J.

Dated: May 5, 1943.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 19-339

CRESCENT EXPRESS LINES, INC.,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants-Appellees.

STATEMENT AGAINST JURISDICTION.

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Hudson Transit Lines, Inc., an intervenor-defendant, and appellee herein, presents this Statement Against Jurisdiction, and respectfully submits that the questions involved in the instant appeal to the United States Supreme Court are so insubstantial as not to need further argument.

Statement of Issues.

The appellant in this appeal to the Supreme Court raises three issues.

The first issue is that the Interstate Commerce Commission and the District Court improperly interpreted Section 308 (a) of Title 39, U. S. Code, in restricting appellant as a

Grandfather common carrier to the same type of service rendered by it on and prior to the Grandfather date.

The second issue raised is that the Commission erred and the Court erred in affirming the action of the Commission in defining the type of plaintiff's Grandfather service as door to door service over irregular routes in non-scheduled operations.

The third issue raised is that the Commission erred in procedure, and that the appellant was deprived of rights without hearing, and that the Court erred in affirming the Commission's action in this respect.

Statement of Fact.

The issues raised by appellant are either unsubstantial or fictitious when examined in the light of the undisputed facts of the case and the existing statutes and court decisions.

The appellant, Crescent Express Lines, Inc., was a Grandfather common carrier operator engaged in a specialized type of service which can, for sake of description, best be called an interstate livery service. The facts concerning its operations consist of its sworn applications filed with the Commission, and of documents and affidavits submitted to and filed with the Commission by appellant itself.

There never has been a dispute of facts in the case.

The only issue that arose was what type of certificate Crescent was entitled to under the law in the light of the facts which it presented.

The applications and the affidavits, all a part of the Commission's record and made a part of the proceedings in the District Court through the submission of a certified copy thereof, are before this Court and may be referred to in verification of any references made thereto. They show that appellant described its service as a radial, territorial

service in which it picked up people with its sedans at their homes and other places in the City of New York and delivered them to their particular destination, whether it be hotel, boarding house, or club, in Sullivan and Ulster Counties, within a twenty mile radius of Woodburn, New York. The operation passed through the State of New Jersey, and was therefore interstate.

The application and affidavits showed that the service operated was dissimilar from regular route train or bus service, and went to whatever place the people wished to go. It was unscheduled, had no regular routes, and was a special form of interstate livery service.

The record also shows hearings had, references to the hearings by Crescent's attorney in communications to the Commission, and subsequent notices of hearings which followed protests filed by this and other objectors.

Through error or inadvertence, the Commission, on June 20, 1938, issued a compliance order improperly specifying the service rendered by Crescent, to which Hudson Transit Lines, Inc. and other objectors immediately filed protests. The Commission acted upon these protests, and referred the matter back to the field office for further investigation and determination with the result that the order of June 20, 1938 never became effective and never vested any rights in Crescent.

At this time, in other similar cases, a long litigation was commenced before the Commission which raised the question of how far the Commission could go in specifying the type of service rendered by a Grandfather operator, which, of course, would, when defined, constitute the basis of permission for continued future operation.

There never was any question as to the necessity for defining special operations as such, or non-scheduled and irregular route operations as such, but a question was raised whether Section 308 (a) of Title 39, U. S. Code, could

prevent the Commission from defining the type of vehicle to be used.

The Commission at first looked to a single phrase in this Section without reference to other parts of the same Section and other Sections of the same Act, and handed down a decision in——

Sullivan County Highway Lines, Inc., 21 M. C. C. 717, disclaiming its power to specify the type of vehicle. Chairman Joseph B. Eastman of the Commission strongly dissented in that case with the result that in that case, and in the

Nudelman case, 28 M. C. C. 91, the Commission corrected the error of its prior erroneous determination and properly held that not only did it have the power, but that Section 308 (a) required it to specify the type of service to be rendered, including all pertinent and necessary parts thereof.

This litigation did not terminate until 1941 when the Commission as a whole, with only one partial dissent, adopted the views of Chairman Eastman. Thereupon, the Commission proceeded to issue orders correctly specifying the type of Grandfather service in the Crescent case, and about one hundred other similar cases which had awaited final determination of the *Nudelman* case.

This is the reason for the lapse of time between the protested order of June, 1938, which never became effective, and the second hearing of December, 1938 on these protests, and the final compliance order of September 2, 1941.

The appellant, Crescent, protested the 1941 order and was given a hearing on briefs and answering briefs in connection with its petition to vacate said order. When Division 5 rejected its pleas, Crescent then appealed to the Commission as a whole, where again the matter was heard on briefs and answering briefs with the Commission as a whole

sustaining the action of Division 5. Then came the appeal to the statutory Court terminating in the decision written by Circuit Judge Learned Hand, and the findings of fact, conclusions of law, and judgment which were prepared and entered by the Court itself. From this judgment, dated February 27, 1943 and entered March 6, 1943, Crescent appealed and filed its petition on April 16, 1943, and served this appellee on April 22, 1943.

First Issue.

Appellant's claimed interpretation of U. S. Code, Title 39, Section 308 (a), is without any basis in reason. It contradicts the Section when read as a whole, is inconsistent with the other provisions of the Act, as contained in Sections 306 (a) and 307 (a), and is contradictory of the expressed purposes of the Transportation Act, formerly known as the Motor Carrier Act. Furthermore, it is contrary to the Act as interpreted by this United States Supreme Court in the cases of—

United States v. *Maher*, 307 U. S. 148, and *United States, et als.* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 62 Supreme Court Reporter 722.

United States Code, Title 39, Section 308 (a) reads as follows:

> "Sec. 308. (a) Any certificate issued under section 306 or 307 shall specify the service to be rendered, and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificates such reasonable terms, conditions and limitations as the public convenience

and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, the requirements established by the Commission under section 304 (a) (1) and (6): Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Appellant claims that the last proviso contained in the section above quoted entitles it to a certificate unrestricted and without reference to the particular type of service it had rendered on and prior to the Grandfather date.

It is important to note that appellant is not seeking a certificate on proof of necessity and convenience, but rather a certificate through being exempt from proving necessity and convenience because of operation on and prior to the Grandfather date. Appellant's claim looks to this one portion of Section 308 (a) and ignores all of that section preceding the parts it stresses. That section commences with a mandate to the Commission requiring it to specify the service to be rendered, and the Grandfather section, to wit, 306 (a), gives the right to continue the same kind of operations rendered on and before June 1, 1935.

In hundreds of truck and passenger cases, the Commission has interpreted the law above referred to in such a way as to permit operation of a kind and character similar to that performed on the Grandfather date.

In the *Nudelman* decision, 28 M. C. C. 91, the Commission indicated many cases where the specification of service to be rendered necessarily included specification with reference to the type of vehicle.

In one of the latest cases in point, to wit,

Dominic Machise, Common Carrier Application, 27 M. C. C. 668,

decided July 27, 1942, the Commission again rejected the type of claim here presented by appellant.

Referring to Sections 306 (a) and 308 (a), the Commission said:-

> "The two sections are linked in subject matter, and must be read together. • • •
>
> The service rendered by a motor carrier involves a number of considerations, including such factors as commodities transported, equipment used, and degree of specialization in particular phases of motor carrier transportation. • • •
>
> Any other conclusion would not only disregard the difference in the essential characteristics of the two types of service, but also would be contrary to the national transportation policy, which requires us to foster sound economic conditions in the motor carrier industry."

In the case of *United States* v. *Maher*, 307 U. S. 148, at page 155, the Supreme Court said:

> "The recognized practices of an industry give life to the dead words of a statute dealing with it. • • • Such recognition is implicit also in the provision of Section 208A, 49 U. S. C. A., Section 308 A, that any certificate issued under Section 206 or Section 207 *shall specify the service to be rendered.*" (Italics ours).

In the case of *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, the Court said:

> "As we indicated in Alton R. Co. v. United States, supra, the purpose of the "grandfather clause" was to assure those to whom Congress had extended its benefits a "substantial parity between future operations and prior bona fide operations. • • • And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only

where the error is patent may we say that the Commission transgressed. That is not this case."

The Court further said:

> "By Section 208 (a) the certificate must specify 'the service to be rendered' by the carrier."
>
> "Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

The claim of appellant in its statement as to jurisdiction that its contention is supported by the Carolina Freight Carriers case is contrary to the fact.

The action of the Commission condemned by the Supreme Court in the Carolina Freight Carriers case was the unnatural freezing into a precise pattern, which had the effect of changing the basic characteristics of the Grandfather service as it had actually been rendered.

In the instant case, the Commission, on the undisputed proof in the case, has, by its order, given Crescent everything which it claimed to have had on the Grandfather date, and has effectuated a substantial parity between the authorized operations and its prior Grandfather operation.

What appellant really complains about is that the Commission did not give it something else for which it had neither Grandfather rights nor a claim to on the basis of proof of necessity and convenience.

Appellant asks for a certificate entitling it to conduct a type of service never rendered by it on and prior to the Grandfather date. It asks for a certificate worded the way it desires instead of worded by the Commission in such a way as to carry out the statutory mandate.

The United States Supreme Court has said that it is up to the Commission to weigh the evidence and exercise its expert judgment on the intricacies of the transportation problem. That Court, in the case of—

United States v. *Carolina Freight Carriers Corporation*, 315 U. S. 475

said:

> "We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricasies of the transportation problems which are involved. That function is reserved exclusively for the Commission."

The prime purpose of the Motor Carrier Act was to provide regulation and foster sound economic conditions in the motor carrier industry and to prevent chaos. This was expressed in the preamble of the Act itself. Appellant's interpretation, if accepted, would permit carriers to change their type of service as the demand arose without any proof of necessity and convenience respecting such changed type of service. One needs no imagination to realize the chaos that would result. Not only would the Commission be virtually stripped of all power of regulation by such interpretation, but the competitive result would destroy all but the strongest carriers.

The United States Supreme Court, in a number of cases, has said that the preamble may be referred to to ascertain intent, and that the Court will consider the evil intended to be remedied.

Price v. *Forrest*, 173 U. S. 410;
Rector v. *United States*, 143 U. S. 457.

The same Court has held that the objects and policy of the law will be considered in interpreting it, and that the

entire statute must be considered rather than giving undue effect to particular words or clauses, and that the intent of the law may not be defeated by rigid adherence to the strict letter.

Helvering v. *New York Trust Co.*, 292 U. S. 455;
Costanzo v. *Tillinghast*, 287 U. S. 341;
Barrett v. *Van Pelt*, 268 U. S. 85;
Fleischman v. United States, 270 U. S. 349.

Appellant ran a specialized, irregular route, livery type service, with flexible seven passenger sedans.

As Commissioner Eastman said in his dissent in the *Sullivan County* case, 21 M. C. C. 717:

> "I think it clear that the character of service which was rendered on and before the Granfather date was differenfiated by the use of the vehicles of the sedan type. • • •
>
> Applicant should, I believe, be restricted to the use of vehicles of the sedan type."

In his dissent to the first Nudelman decision in 22 M. C. C. 275, before that was reversed by Division 5 and by the Commission as a whole, 28 M. C. C. 91, Chairman Eastman said:

> "I believe that applicants should be limited in the type of vehicle that they may use. The Joint Board recommended a limitation to automobiles of the sedan type. The Examiner recommended that the service be limited to transportation of not more than six passengers in any one vehicle, which is perhaps a better way of accomplishing the same result."

These views of Chairman Eastman were subsequently adopted by the entire Commission. They clearly indicate that the Commission, in defining and specifying the type of service in the Crescent order appealed from, was not attempting to do by indirection something it felt it could not

do directly, as appellant contends. It recognized the fact that the limitation of the passengers carried was the same as the limitation of the type of vehicle to that type used on the Grandfather date in those cases where the type of vehicle constituted one of the essential characteristics of the specialized service.

Appellant's pretense in its statement as to jurisdiction that it is permitted to operate forty passenger buses, but only to carry six people in them, is quite contrary to the fact. It has no right to operate vehicles under its Grandfather claims which would change the personalized, flexible, livery type service previously operated by it.

The details attendant upon specifying the type of service constitutes a function exclusively reserved for the Commission. Nothing in this case indicates that the Commission erred in this respect, but, on the contrary, its interpretation is the only reasonable interpretation which can carry out the statutory mandate to the Commission and effect the avowed purpose of the Act itself.

Appellant's claimed interpretation, when analyzed, presents a frivolous rather than a substantial issue.

The learned decision of Circuit Judge Hand is clear and convincing.

Appellant's contentions are not worthy of further argument on this its main issue.

Second Issue.

The second issue of appellant alleges error to the Court in affirming the action of the Commission in specifying Crescent's service as a door to door, irregular route, non-scheduled, special, operation.

The objection to the declaration of its type as special operation is particularly frivolous because, except for regular route operation (which Crescent was not, as indicated

by its uncontradicted applications and proof), the Commission may not grant a certificate not specifying particular routes in passenger carrier cases unless the grant be as a special operation.

United States Code, Title 39, Section 307 (a). (Last sentence).

Likewise the obligation of the Commission, in Section 308 (a), to "specify the service to be rendered" justified its description in the other respects above mentioned.

As indicated by the Supreme Court in the Carolina case, the scope of the certificate entails the weighing of the evidence by the Commission and the exercise of its expert judgment, and this function, as the Court said, is exclusively reserved for the Commission.

The distinction between regular and irregular routes has been repeatedly recognized by the Supreme Court, and one of the latest cases in which it recognized this was—

Royal Cadillac Service v. *United States*, 63 Supreme Court Reporter, 158,

where the Supreme Court granted motions to affirm the judgment of the statutory court.

It is interesting to note that the same interests and the same counsel which sought to break down the law in the Royal Cadillac case are now appearing as and for the plaintiff in this instant case.

Appellant's claim in its statement as to jurisdiction that its operations were regular route operations is so contrary to the undisputed facts that we will merely refer the Court to Crescent's own applications contained in the record, and to the many affidavits Crescent filed with the Commission, which are also in the record, indicating its type of Grandfather service. Its claim to dissimilarity with certain types of operation termed by the Commission as special operations is wholly irrelevant.

The Peninsula and Red Star operations were sightseeing operations, and therefore special operations, but all special operations are not sightseeing operations. Appellant might just as well have claimed that because an orange is fruit, all fruit must be an orange.

It is noteworthy in the findings of fact prepared by the Court itself, in Paragraph 7, the Court stated:

> "The certificate issued on September 2, 1941 truthfully (specifies) the service rendered by the plaintiff and its predecessors as of June 1, 1935."

The second issue of appellant is even less substantial than the first and constitutes no justification for further argument.

Third Issue.

The third issue of appellant is its claim that the order of September 2, 1941 was entered without any procedure or evidence to sustain it.

Suffice it to say that the undisputed evidence of Crescent's own proof sustains the order, and the transcript in evidence of the Commission's record indicates notice and hearing with action by the Commission upon all of the evidence after it had finally settled the issue of law litigated in the Nudelman case above cited. The record shows that hearings were had, and the Court below found that there had been such hearings. In addition, it must be remembered that appellant had full hearing before Division 5 of the Commission, and likewise on its petition for reconsideration had further hearing before the Commission as a whole. It is true these hearings were had on written argument, based upon appellant's own undisputed factual record, but this in law is sufficient as previously determined by the United States Supreme Court in the case of *Morgan* v. *United States*, 298 U. S. 468.

Likewise, the claim made that the Commission made no findings to justify its order of September 2, 1941 is without

merit as reference to this order will indicate. The order itself found that Crescent on June 1, 1935 had operated according to the specification of service contained in the order, and contained the statement that the Commission so found, whereupon it proceeded with the order for the issuance of certificate. These constituted sufficient findings to justify the order.

It is not necessary to make detailed findings, or to set out the primary evidence considered.

Visceglia, et als. v. *United States*, 24 Federal Supplement 355.

Appellant's third issue is likewise unsubstantial.

Conclusion.

Appellant presents no substantial issue requiring further argument.

The statute is clear, and the decisions of the highest court of our land clearly show that appellant is entitled only to authority for operations having a substantial parity with its prior grandfather operations. This is what it asked for in its applications. This is what the Commission gave it. Its claims, however specious, are particularly unsubstantial and fall within the precedent of *McArthur* v. *United States*, 315 U. S. 787.

The questions raised on this appeal are so unsubstantial as to require no further argument.

The annexed Motion to Affirm should be granted.

Respectfully submitted,

James F. X. O'Brien,
Attorney for Appellee,
Hudson Transit Lines, Inc.
17 Academy Street,
Newark, New Jersey.

Dated: May 5, 1943.

FILE COPY

MAY 17 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1030

CRESCENT EXPRESS LINES, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF MOUNTAIN TRANSIT CORPORATION OPPOSING JURISDICTION AND MOTION TO AFFIRM.

HENRY P. GOLDSTEIN,
Counsel for Appellee,
Mountain Transit Corporation.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC.,

Plaintiff,

against

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants,

and

HUDSON TRANSIT LINES, INC., AND MOUNTAIN TRANSIT CORPORATION,

Intervenors.

STATEMENT MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES AND MOTION TO AFFIRM DECREE AND JUDGMENT OF STATUTORY COURT.

Facts.

This is a suit filed by plaintiff to set aside orders of the Interstate Commerce Commission so as to reinstate a prior order. The orders sought to be set aside are: (1) an order dated September 2, 1941 (Exhibit A annexed), awarding to the applicant a certificate of convenience and necessity as

described therein and setting aside a previous order dated June 20, 1938 (Exhibit D annexed), covering the same facts; (2) an order dated March 17, 1942 (Exhibit B annexed), denying a petition objecting to the order of September 2, 1941; and (3) an order dated July 13, 1942 (Exhibit C annexed), denying petition filed by applicant against the order issued March 17, 1942.

The order dated September 2, 1941 (Exhibit A annexed), authorized the issuance of a certificate of public convenience and necessity subsequent to further consideration in the pending proceeding before the Commission (Docket No. MC-78980) as follows:

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:
>
> Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

The said order also directed that the previous order issued in this proceeding describing the authority to which applicant has ben found to be entitled be vacated and set aside.

The pertinent facts in the proceedings are as follows:

Herman Trevax, Jacob Vangrofsky, Murray Galley and Morris Glickman, a partnership doing business as Crescent

Mountain Service, filed BMC-A application on February 12, 1936, and on March 26, 1937, filed a BMC-A2 form in which it set forth in detail the type of operation which it conducted and for which it sought authority. (It even went so far as to indicate that because of its operations of sedans, that it was exempt from any and all provisions of the Motor Carrier Act and that the filing of the application should not be deemed a waiver of its rights thereunder.) In the Exhibit A attached thereto, the applicant claimed that it went from New York City via the George Washington Bridge to Suffern and Wurtsboro, where traffic was distributed to the summer resorts within a radius of 20 miles from Woodbourne, N. Y. There was annexed a map indicating the New York area and the manner in which the applicant traveled to the area in and Wurtsboro and *indicated by a large irregular circle as the area served by it.* Attached to the exhibits was a card which read as follows:

"7 Passenger Cars
Leaving Daily to All Parts of the Mountains . . .
At Lowest Rates
(a number of places were listed)
From Your Home to Your Hotel
Boarding And Rooming Accommodations if desired.
Please Call to See Us at Our Residence
About Reservations.
CRESCENT MOUNTAIN SERVICE
531 East 169th Street."

There was no claim made for intermediate points below the mountain area.

On May 7, 1938, a compliance order was issued and on June 20, 1938, corrected compliance order was issued which was in conformance with the then existent practice of the Commission. The corrected order is that in the complaint, Exhibit D. Please note that in accordance with the application this order limited the operating authority in the moun-

tain area to "intermediate and off-route points within 20 miles of Woodbourne", whereas the previous order, which had been vacated or which had been corrected and which had been dated May 7, 1938, had read, "All Intermediate Points" and then, "Off-route points: Points and places within 20 miles of Woodbourne." In other words, the Commission, when it issued its compliance order of May 7, 1938, had at first improperly described the intermediate points and then issued its own corrected order of June 20, 1938, which is the order that the applicant would like to remain in force and effect, to indicate that the intermediate and off-route points were only within 20 miles of Woodbourne.

On June 28, 1938, Exceptions were filed by protestants to the order of June 20, 1938, wherein it was stated, amongst other things: (a) that no regular route operation was operated in the year of 1935; (b) that no business of any kind was done by the applicant or any of its alleged partners at any time at points between New York City and Wurtsboro, N. Y., or the so-called "points in the mountains"; (c) that the applicant or any of its alleged partners did not do any business to all of the points and places within 20 miles of New York; and (d) that the applicant or any of its alleged partners at no time operated between fixed termini.

Prior to the issuance of the compliance orders, order to show cause had been served upon the partnership applicant to dismiss the application for failure to prosecute. An appearance was then made at informal hearings by an attorney representing the applicants; the application was referred to the District Office of the Interstate Commerce Commission for further investigation and informal hearing and conference with the applicants. At the informal hearings before a District Supervisor, additional proof of operation, in the form of affidavits and oral statements, were submitted. It was based upon the sworn statements in the

BMC-A, the BMC-A2, the affidavits, and additional proof that the compliance order of June 20, 1938 (Exhibit D annexed) was issued. These affidavits were made by persons hereafter indicated and contained, among other things, the statements after their names:

1. RUBIN FRIED—January 10, 1938:

"The reason for their service is that they transport people to hotels located in all roads and by-roads, obviating the necessary of their passengers having to use foot or other extraordinary means to get to their actual destination."

2. HARRY K. COHEN, hotel owner—Woodbourne, N. Y. —January 10, 1938:

"I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service, since May, 1932. Their business has been the transportation of guests of mine from New York City to my hotel, and from my hotel to New York City."

3. MOE BAIL—Woodbourne, N. Y.—January 10, 1938:

"We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City. * * * I have also been transported by them from my hotel to New York City. During my passage, I noticed that they picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City."

4. IZZY F. FELDMAN—hotel owner—Woodridge, N. Y.—January 10, 1938:

"They operate seven passenger sedans and carry passengers to and from summer hotels located in Sullivan and Ulster Counties. * * * The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of trans-

portation to and from my hotel since 1932. * * * I sincerely believe that their mode of transportation is extremely necessary and convenient for my own and my guests' needs."

5. ISRAEL LEVINE—store proprietor—used by applicant at 531 East 169th Street, New York City—January 14, 1938:

"I have personally seen them arranging for said trips with passengers."

6. ADELE DINCENTHAL -Bronx, N. Y.—January 14, 1938:

"In the summer of 1933 and 1934, I hired the aforesaid persons (referring to the applicants) to transport me and my family from their office to Accord in the County of Ulster. * * * My family and I have personally found that this method of transportation is most convenient, and the most economical for our purpose."

7. EDNA LIVINGSTON—Bronx, N. Y.—a person who had hired a car of applicants for herself and her family—January 14, 1938:

"Riding with us at the times that we were transported to North Branch, New York, by the aforementioned Crescent Mountain Service, were other passengers who were transported to other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake."

(Note: A reference to a map will disclose that the operator serving all of these points in the one car was obviously operating over irregular routes and not between fixed termini.)

8. HARRY TREVAX—the father of one of the applicants—January 14, 1938:

"My wife and I helped him out by answering phone calls and booking work."

In addition to the affidavits as aforementioned, there were submitted the books indicating the manner in which the partnership conducted this business which were diaries showing reservations for passengers. At no time was there ever produced any schedules of operations or any proof of operation of a regular route terminal to terminal operation, nor any advertisements, holding outs, leases, or other evidence indicative of such an operation.

Upon all of this proof, the Commission issued the compliance order of June 20, 1938, limiting the applicant's service to points in New York City, on the one hand, and intermediate and off-route points within 20 miles of Woodbourne, on the other, and described a regular route as the method of operating between New York City and the area. Exceptions of protestant being duly filed to the order of June 20, 1938, the Commission then had before it the complete record upon which it would have to make a determination as to the authority which the applicant was entitled to. *There never was a dispute as to the facts.*

After the filing of the Exceptions by protestants to the order of June 20, 1938, the proceedings were again referred back to the Commission District Office for further informal investigation and on October 31, 1938, District Supervisor D. V. Grant of New York addressed a letter to the applicant's predecessors advising them:

> "Upon specific complaint, the finding made by this Commission in the matter of your 'grandfather' rights has been stayed and the application returned to me for further informal investigation and report."

They were requested to be present on December 1, 1938, at which time protestants were also present.

At the informal conference on December 1, 1938, no additional data was submitted over and above that originally given to the Examiner and that data consisted of evidence

of sedan movements over irregular routes in a door-to-door service, between points in New York City, on the one hand, and specific points in Sullivan and Ulster Counties, on the other.

While these proceedings were pending, the Commission had before it 58 applications involving the identical territory, type of operation, and the question as to the type of service to be described in any certificate to be issued to the operators of such service. These cases were consolidated by the Commission and were known by it as *Irving Nudelman, Common Carrier, MC-86772, et als.* In addition to these 58 cases, there was the application of *Sullivan County Highway Line, Inc., MC-29649*, covering identical and similar facts of operation,

On February 15, 1940, the Commission, Division 5, submitted its report on the *Sullivan County Highway case* and on March 20, 1940, submitted its report in the *Nudelman et als. cases.* On February 25, 1941, the Commission, Division 5, on reconsideration, submitted its further report in the *Nudelman cases* and on August 2, 1941, submitted its further report on the *Sullivan County Highway case*, wherein they found that applicants were engaged in special seasonal operations as common carriers by motor vehicle of passengers and their baggage, between New York, N. Y., or portions thereof, on the one hand, and Sullivan and Ulster Counties, N. Y., or portions thereof, on the other, over irregular routes through New Jersey, by restricting the authority to special operations in non-scheduled door-to-door service, limited to the transportation of not more than 6 passengers in any one vehicle, but not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats.

On September 2, 1941, the order, (Exhibit A annexed) attacked herein, was issued which merely substituted a description of applicant's type of service rendered on June 1,

1935, in conformity with the Commission's determination in the *Nudelman* case in the place and stead of its previous description of the type of authority as contained in the order of June 20, 1938 (Exhibit D annexed) which applicant seeks to have remain in force and effect.

On October 9, 1941, applicant, a corporation succeeding to the interests of the partnership, filed a protest and petition to stay issuance of the certificate authorized in the order of September 2, 1941, wherein they urged that said order was issued without notice; that it changed the content of the previous compliance order so as to direct a non-scheduled door-to-door service over irregular routes with vehicles having no more than 6 passengers; and that the real issue was whether the Commission had the right to restrict a carrier to vehicles of the sedan type. This petition was filed 37 days after September 2, 1941, although the order of September 2, 1941, directed that Exceptions thereto by the applicant should be filed within 30 days therefrom.

Said petition requested that the order be vacated and set aside and the compliance order of June 20, 1938, reinstated. No issue was made therein as to the facts, nor was any request for further hearing or facts essential to such request contained in this petition. Said petition was denied on March 17, 1942 (Exhibit B annexed).

On April 3, 1942, applicant filed petition for reconsideration by the entire Commission and/or to reopen and grant a hearing. It was repeated therein that no hearings to support the new order were had and that there was no evidence taken to support the change in the order previously issued on June 20, 1938. The said petition went on further to state: "The only evidence in the record is that taken at the ex parte hearing which was sufficient to support the compliance order of June 20, 1938, or the same would not have been made." That the restrictions in the order of Septem-

ber 2, 1941, were contrary to statute and that the alleged limitation and restrictions were in violation of Section 208 (a) of the Motor Carrier Act, to the effect that any certificate issued should not restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate as the development of the business and the demands of the public should require. This petition was denied by the entire Commission by its order of July 13, 1942 (Exhibit C annexed).

Appellants' Claim to Jurisdiction and Determination by the Supreme Court of the United States Is Not Substantial.

It is respectfully urged that all of the alleged issues set forth by the plaintiff herein are not substantial and, therefore, the decree and judgment of the lower court should be affirmed.

Plaintiff alleges that the Commission has exceeded its statutory authority in making the order of September 2, 1941, (a) by limiting or restricting the rights granted so that plaintiff should not transport more than 6 passengers in any one vehicle; (b) by limiting to door-to-door service; (c) by limiting operation over irregular routes; (d) by limitation to non-scheduled operations; and (e) by limiting the rights granted to special operations.

That the alleged limitations were made for the purpose of restricting and limiting the plaintiff to the use of 7 passenger sedans as distinguished from larger vehicles.

That there is no factual or legal basis for limiting the rights granted to transport only 6 passengers because it fails to take into consideration that a large number of children under 10 years of age might require transportation with their parents.

That the order of September 2, 1941, is unlawful and illegal and without proper foundation, but that the conclusions of the order of June 20, 1938, were correct, and that the action of the Commission in making the order dated September 2, 1941, was incorrect and illegal because it was not based on new, additional, or different evidence, as no further hearings were had, and therefore, no facts were before the Commission sufficient to sustain said order.

That the order is incorrect because by the limitation to door-to-door service, many passengers go to stations maintained by plaintiff which are within the towns and villages served by it.

That the restriction to irregular routes is contrary to the statute and geographical conditions in the area and that the description of "special operations" is arbitrary and illegal and that said words are meaningless, vague and uncertain and ambiguous. (See amended complaint.)

Statutes Involved.

The following sections of the Interstate Commerce Act are pertinent herein:

> Sec. 206 (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, However, That*, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service

only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful * * *.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission,

Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208. (a) Any Certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certifi-

cate, as the development of the business and the demands of the public shall require.

Sec. 204(a) (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; * * *

Sec. 205(h) All the provisions of section 17 of part I shall apply to all proceedings under this part.

Sec. 17 (3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

ARGUMENT.

It is quite clear that plaintiff does not take issue with the Commission on the facts as submitted by it or its predecessors and that in form BMC-A2 and at two informal hearings, full opportunities were afforded the predecessors to present their evidence which would entitle them to a certificate. It is noteworthy that after October 31, 1940, at which day plaintiff, Crescent Express Lines, Inc., was substituted for the partnership, that legal objections were made to the procedure of the Commission. The partnership predecessors had had two informal hearings; one prior to the issuance of the order of June 20, 1938; and the other after filing of exceptions to said order by protestants, and after the stay of said order of June 20, 1938.

At the time the corporation plaintiff herein succeeded to the interests of the partnership, it was in no better position and was not entitled to any more right or authority than the partnership. At the time that it succeeded, it did so with full knowledge of the fact that there was pending before the Commission exceptions to the order of June 20, 1938, and that there was pending before the Commission the question of the proper description of type of service

rendered by applicant and other similar types of carriers in the territory. Protestants had never denied that plaintiff's predecessors were entitled to a certificate of convenience and necessity pursuant to Section 206 (a) of the Motor Carrier Act, but always insisted that in accordance with the provisions of Section 208(a), the certificate issued should specify the service to be rendered, and, in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate and that, in accordance with Section 207, a certificate should be issued herein for special operations as distinguished from regular route and between fixed termini.

Plaintiff makes issue of the fact that the order of September 2, 1941, could not be issued by the Commission because there had not been any further hearing, nor had there been obtained or adduced additional or new information or evidence to support this new order. Section 206(a), commonly known as the "grandfather" clause, authorizes the Commission to issue a certificate to passengers carriers who were in bona fide operation on June 1, 1935, or, if engaged in seasonal service, during the season ordinarily covered by its operation, without being required to prove convenience and necessity as provided in Section 207(a) of the Act. Section 207 permits a certificate to be issued to any qualified applicant if it is found that the applicant is fit, willing and able to properly perform the service proposed and to conform to the provisions of Section 207 and the requirements, rules and regulations of the Commission thereunder. (In the case of those persons proceeding under Section 206, it was not necessary to find convenience and necessity.)

The method in which the Commission could issue the certificate was left entirely to it. Accordingly, the order of June 20, 1938, was issued which plaintiff herein would

be satisfied with and therefore no question is raised before this Court as to the propriety of the procedure of the Commission in the issuance of said order of June 20, 1938, upon the record and proceedings before the Commission. This record and proceedings have been fully enumerated heretofore. Upon the filing of exceptions by protestants to said order, legal questions were raised as to the description of service and type of service to be inserted in a certificate to be issued to the applicant's predecessors. The order of June 20, 1938, authorized a regular route scheduled terminal to terminal service.

The facts in respect to the method of operation by the applicant's predecessors on June 1, 1935, and thereafter indicated that they were, in fact, engaged in a service which is properly described as a door-to-door, non-scheduled, irregular route service, using vehicles transporting no more than 6 passengers exclusive of the driver and children under 10 years of age who do not occupy a seat. This type of service was identical to that as contained in the *Nudelman and Sullivan County Highway* cases and obviously the delay in issuing a new order after the Exceptions to the order of June 20, 1938, was occasioned by the pending proceeding as to the question of law involved.

In the *Nudelman* cases, the Commission in its first report described the service rendered as "seasonal service for the transportation of passengers and their baggage in 7 passenger sedans between New York City, or portions thereof, on the one hand, and summer resorts in the Catskill Mountains, hereinafter referred to as the Mountains, in Sullivan and Ulster Counties, on the other." It states further that the type of service rendered was as follows:—

> "That generally the applicants operate door-to-door, not over fixed routes, nor between fixed termini, and not on fixed schedules; that they do not pick up or discharge passengers in the State of New Jersey; that the

fair paid by each passenger each trip is subject to oral agreement between such passenger and the carrier, and no written contracts are entered into; and that passengers are transported by motor vehicle across State lines upon and over public highways for compensation." (22 M.C.C. 277).

In its report on reconsideration, 28 M.C.C. 91, 93-95, it states:—

"Upon further consideration we are of the opinion that our prior construction of Section 208(a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, 'the service to be rendered,' subject to the proviso that we cannot restrict the right of a carrier to 'add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require.' In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitations to the quantity of the service to be furnished. This construction is in line with our decision in *Pittsburgh-Weirton Bus Co., Inc., Com. Car. Application* 10 M.C.C. 266, wherein we discussed the meaning of the proviso in question. In that case, the issue was presented as to whether that applicant had inaugurated a new operation by increasing its service between 2 points from 1 round trip daily to 250 one-way trips daily. In deciding that question in the negative, we construed the proviso of section 208(a) to mean (page 270):

This prohibition protects the right of the carrier to expand not only its 'equipment' but also its 'facilities.' The only purpose of such expansion is to enable the carrier *to provide more service*, and this is very clearly indicated by the words 'as the development of the business and the demands of the public shall require.' It follows that 'terms, conditions, or limitations' in the certificate restricting *the service* of the carrier would

be wholly inconsistent with this proviso. (Emphasis supplied.[1])

We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the servicce to be rendered. What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its service to meet the demands of the public.

With this exception, our power to specify in any certificate we issue the service to be rendered is complete. For instance, in *Schwerling Common Carrier Application*, 23 M.C.C. 459, we required the applicant carrier to maintain a schedule of not less than one round trip per hour during certain periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment. For example: In *Miller Extension of Operations*, 21 M.M.C. 401 (prior report, 12 M.C.C. 457), the authority granted therein was restricted to liquid petroleum products in tank trucks; in *Myers Common Carrier Application*, 23 M.C.C. 451, authority was restricted to driveaway service; in *Central Truckaway System, Inc., Com. Car. Application*, 19 M.C.C. 713, authority was restricted to truck-away service; in *Parcel Delivery Service, Inc., Contract Carrier Application*,[2] 8 M.C.C. 275, authority was granted to transport packages and parcels of merchandise by motor vehicle 'the equipment being limited to motorcycle traffic cars, with panel bodies'; in *Billy Baker Co., Common Carrier Application*, 24 M.C.C. 805, authority was granted to transport, among other things, cement in dump trucks; and in *Barrows Common Carrier Application*, 19 M.C.C.

[1] In this report, wherever quoted words or phrases are italicized, it is to be understood that such emphasis is supplied.

[2] Although this application was later dismissed for reasons not pertinent herein, the same applicant on April 10, 1939, was issued a certificate containing the same restrictions pursuant to *Parcel Delivery Service, Inc., Common Carrier Application*, 13 M. C. C. 15.

179,[3] authority was restricted to the transportation of not more than six passengers per trip. Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted.

Because we have the power to restrict a carrier to the use of certain types of vehicles, in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits."

By virtue of the determination in the *Nudelman case* the Commission, by its order of September 2, 1941, merely authorized the issuance of an appropriate order properly describing the service rendered by plaintiff's predecessors upon all of the evidence and facts before it. Plaintiff does not dispute or deny the facts and method of operation. It attempts to confuse the issue by stating that the order of September 2, 1941, limits the holder of the certificate to the use of sedans in contravention of that portion of Section 208(a) which permits a carrier to increase or decrease its service as the demands of the business may require. The Commission in the *Nudelman* report, heretofore recited, has fully discussed its position in respect thereto. Simply stated, it merely means that once a certificate is issued, whether it be pursuant to Section 206 or 207 describing the type of service to be rendered, then there shall be no limitation as to the quantity of that type of service.

The plaintiff claims that by virtue of the failure of the Commission to conduct further hearings or to have before it additional evidence, its rights would be prejudiced, and that it was being deprived of its property without due

[3] No exceptions to the order recommended by the joint board in this case were filed, and, not having been stayed or postponed by us, it became effective as our order by operation of law.

process of law. Since the plaintiff and its predecessors were proceeding pursuant to Section 206, and, in order to issue a certificate pursuant thereto it is incumbent upon the Commission to ascertain in such proceedings and manner as are just and equitable, the extent of the service rendered, and, plaintiff's predecessors having had two opportunities at informal conferences of submitting data to support its application, at one of which conferences protestants and other carriers in the area were not notified, nor were they present, it cannot be stated that plaintiff is being deprived of its rights or property. The only ones who would be in a position in this case to make claim of prejudice or of not having had an opportunity to present evidence, it would be the protestants, by virtue of the fact that they were never apprized of the first informal hearing. The protestants, however, have always conceded that applicant's statements at the informal hearings were true statements as to the facts of operation but have merely differed on the question of law as to the type of service to be described in a certificate to be issued.

Plaintiff, as successor to the partnership by the order of September 2, 1941, is being awarded a certificate fully and properly descriptive of the type of service rendered on June 1, 1935. Its arguments that elements of safety and certain inconveniences to children under 10 years of age were not taken into consideration were not matters for consideration under Section 206. The question of safety of operations is an administrative problem which the Commission is fully authorized to handle. The question of inability of certain children under 10 years of age to ride without paying fare is an element of convenience and necessity not involved in a proceedings under Section 206.

The Commission, Upon Investigation and Proceedings Having Obtained the Facts of Operations, Is in the Same Position as Having Made Its Own Findings and Is Accordingly Authorized to Issue a Certificate Pursuant to Section 206.

The Commission must, in the issuance of such a certificate, properly distinguish and describe the service to be rendered. Its description of a door-to-door irregular route non-scheduled service limited to the transportation of not more than a certain number of passengers is a proper method of description of types of operations. The question as to differences in types of operations has been passed upon by the United States Supreme Court.

United States v. *Maher*, 307 U. S. 148, 152-153:[4]

> "On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206 (a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206 (a) from the requirements of Section 207. The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under Section 206(a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through

[4] This question was presented to the United States District Court in Oregon while exemptions to the order of June 20, 1938, in these proceedings were pending and a final determination was made by the United States Supreme Court on April 17, 1939.

familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established."

Page 155:

"The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiation between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory', Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208(a) 49 U. S. C. A. #308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate.'"

Alton R. Co. v. *United States*, 315 U. S. 15, 23:

"Appellant railroad companies also urge that Fleming should not have been awarded any rights under the 'grandfather' clause in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal. Thus there was evidence that on and since June 1, 1935, Fleming had been in bona fide operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have

said, that function is peculiarly one for the Commission not the courts."

Rochester Telephone Corporation v. *U. S.*, 307 U. S. 125, 138-140:

"While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act in 1906, and the Mann Elkins Act in 1910, the establishment of similar agencies in many states following the lead of New York and Wisconsin, the widespread recognition that these specific instances marked a general movement, made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This Court 'ascribed' to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois Central R.R. *vs.* Interstate Commerce Commission, 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Recognition of the Commission expertise also led this court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

"From these general considerations the Court evolved two special doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Commission *v.* Illi-

nois Central R. R., 215 U. S. 452, 470, 30 S. Ct. 155, 160, 54 L. Ed. 280; Interstate Commerce Commission *v.* Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

Page 146:

"The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body." Mississippi Valley Bargeline Co. *v.* United States, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 693, 694, 78 L. Ed. 1260; Swayne & Hoyt, Lt. *v.* United States, 300 U. S. 297, 303 et seq., 57 S. Ct. 478, 480, 81 L. Ed. 659."

United States et al. *v.* Carolina Freight Carriers Corp., 315 U. S. 475, 480.

"We think the Commission was justified in the restrictions which it placed on the geographical scope of appellee's operations. Sec. 206 (a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor was 'in bona fide operations as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application and has so operated since that time.' Sec. 208 (a) requires that the certificate specify 'the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate.' It is clear from these provisions that the power of the Commission to authorize future operations within a designated 'territory' rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant cases, it

may extend to all points in a part of that area, and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. Alton R. Co. *v.* United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. —. The act, provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to service a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald *v.* Thompson, 305 U. S. 263, 266, 59 S. Ct. 176, 178, 83 L. Ed. 164."

Page 483 says:

"Sec. 206 (a) requires a showing that the applicant or its predecessor, was 'in bona fide operation as a common carrier' on June 1, 1935, and 'since that time'. By #208 (a) the certificate must specify 'the service to be rendered' by the carrier."

WHEREFORE, it is respectfully prayed that the decree and judgment of the statutory court be affirmed.

Dated: New York, N. Y., May 4th, 1943.

Respectfully submitted,

HENRY P. GOLDSTEIN,
Attorney for Intervenor,
Mountain Transit Corporation,
Office & P. O. Address,
1450 Broadway,
Borough of Manhattan,
City of New York.

EXHIBIT "A".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 2nd day of September, A. D. 1941.

No. MC-78980.

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK.

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity upon compliance with the terms of said order; that protests or exceptions to said order having been duly filed; and further consideration having been had:

It further appearing, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Interstate Commerce Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, and upon filing appropriate publications providing for the cancelation of any effective rates or charges applying to transportation service in excess of that herein or otherwise lawfully authorized, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and rquesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

[SEAL] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 2nd day of September, A. D. 1941.

No. MC-78980

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passen-

gers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

EXHIBIT "B".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 17th day of March, A. D. 1942.

No. MC-78980

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

This proceeding coming on for further consideration:

It appearing, That a petition has been filed by applicant objecting to the order of September 2, 1941, issued herein; and further consideration having been had, and good cause appearing therefor;

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission, division 5.

[SEAL.]

W. P. BARTEL, Secretary.

EXHIBIT "C".

Order.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of July, A. D., 1942.

No. MC-78980

CRESCENT EXPRESS LINES, INC.,
NEW YORK, NEW YORK

Upon consideration of the record in the above-entitled proceeding and petition filed by applicant against the order issued March 17, 1942; and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission,
[SEAL.] W. P. BARTEL, Secretary.

EXHIBIT "D".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 20th day of June, A. D. 1938.

No. MC-78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said ap-

plicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216 and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorinzing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is futher ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this* order, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with

the requirements therein specified, be and it is hereby, vacated and set aside.

By the Commission, division 5.

[SEAL.] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 20th day of June, A. D. 1938.

No. MC-78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:

Between New York, N. Y., and Woodbourne, N. Y.:

From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne, and return over the same route.

Intermediate and off-route points within 20 miles of Woodbourne.

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tion for appeal was presented and allowed on April 16, 1943 (R. 36–37). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)).

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 34–39.

QUESTIONS PRESENTED

The Commission, acting under the so-called "grandfather" clause of Section 206 of Part II of the Interstate Commerce Act, issued a certificate to appellant authorizing the continuance of its operations as a common carrier by motor vehicle of passengers and their baggage in a described area. The certificate was limited to "special operations, in non-scheduled door-to-door service, * * * of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes" (R. 115–117). The questions presented by this appeal are:

1. Whether the Commission exceeded its authority in limiting the certificate as above specified.

2. Whether the Commission's order is supported by substantial evidence.

3. Whether appellant was accorded a fair hearing.

STATEMENT

This is a suit to set aside an order of the Interstate Commerce Commission, dated September 2, 1941, finding that appellant on June 1, 1935, and continuously since, has been in *bona fide* operation:

> as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, * * * as specified below:
>
> Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

(R. 116–117.)

and limiting its "grandfather" rights to such service. This order arose as follows:

On February 12, 1936, certain individuals, comprising a partnership known as Crescent Mountain Service,[1] filed a "grandfather" application, which was followed by a "statement of facts" filed March 26, 1937 (R. 43, 45), supplying certain information showing the type of service rendered and the routes of operation (R. 47–48), together with a map defining the routes and territory served, and other pertinent information (R. 49–54). At the same time, the applicant filed a statement (R. 46) wherein it "reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver of any of the applicant's rights."

Following the practice adopted for expediting the numerous applications pending before the Commission, the application was referred to a field representative for a report on the nature and extent of the operations. On December 22, 1937, the applicant was directed to appear before local officials of the Commission at its New York office on January 11, 1938, to complete copies of a questionnaire which had been sent to the applicant and also to supply information called for by

[1] The partnership name was later changed to Crescent Cadillac Lines, and appellant corporation is its successor (R. 94, 112).

other forms (R. 55). The applicant failed to appear at the time and place suggested (R. 56), but on January 15, 1938, two of the partners appeared with the applicant's attorney and submitted "facts and evidence" (R. 62–83, 92, 94).

Protests against the granting of authority to the applicant were filed (R. 84–88), and on March 3, 1938, the Commission entered an order in this and other cases, in the nature of a rule to show cause, directing attention to the fact that an application for authority under the Act had been filed and that the applicants had failed to comply with various requests to furnish the facts necessary to a proper disposition of the applications. The applicants were required to state within 30 days why the application should not be dismissed. (R. 89–91.)

Appellant's predecessor, through one of the partners, filed an answer on March 19, 1938, in which it was stated (R. 94)—

> that the above applicant was duly notified to appear and submit facts and evidence on January 11, 1938. An adjournment was made to January 15, 1938. On January 15, 1938, Morris Glickman and I appeared with our attorney, Milton Cotton, Esq., at the New York District office of the Interstate Commerce Commission and submitted facts and evidence in support of our application.

On June 20, 1938, the Commission, Division 5, issued a compliance order,[2] the material portion of which reads as follows (R. 105):

> The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:
>
> Between New York, N. Y., and Woodbourne, N. Y.:

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[2] Such an order was described by this Court in *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78, as an "ex parte permit."

As to the effect of a "compliance" order, the United States District Court for the Western District of Missouri said in *Hoerman* v. *United States*, decided June 5, 1941, not reported:

> The whole force of Point I, however, depends upon the assumption that the Commission had once granted a certificate to plaintiff. But it had never done that. The Commission only had granted a conditional permit (called a "compliance" order), reserving jurisdiction ultimately to grant or deny the application. (There was such a multitude of applications under the grandfather clauses that no course was practical other than to grant temporary permits and defer final action.) Nothing in the act forbids such a reservation of jurisdiction.

See also *Ideal Motors, Inc., Contract Carrier Application*, 24 M. C. C. 187; *Merchants Parcel Delivery Co., Inc., Contract Carrier Application*, 21 M. C. C. 93, 94; *Charles Burnett Trucking Co., Inc., Common Carrier Application*, 10 M. C. C. 615, 616.

> From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne, and return over the same route.
>
> Intermediate and off-route points within 20 miles of Woodbourne.

This was a considerably broader certificate than the one now under attack (cf. p. 8, *infra*). Protests against the granted authority were filed by a number of competing motor carriers (R. 105–111), as a result of which letters of September 14, 1938, advised the protestants that their objections had been considered and "you are hereby advised that the facts set forth in support of such objections have been deemed sufficient to warrant referring this case back to the field for further investigation" (R. 109–111). The order of June 20, 1938, never became effective. Further informal hearing was held on December 1, 1938 (see R. 121, 31). Appellant's predecessor was given notice of this hearing[3] but did not at-

[3] The lower court found that notice was given to appellant (R. 29, 31) although appellant denies (Br. 6, 15) that notice was given. Actually, a notice of rehearing was sent by the Commission to appellant's predecessor, which was then operating the business (see R. 121, 31).

tend. No new evidence was offered at this hearing (R. 122, 31).

After reconsideration of the same record, the Commission issued the present certificate on September 2, 1941, granting appellant the right to operate between New York and points in Sullivan and Ulster Counties, New York. However, the Commission restricted in certain respects the type of service to be performed. Thus, the certificate limited appellant's service to "the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats". It also described the service to be rendered by appellant as "door-to-door service,"[4] as being "non-scheduled", and as constituting "special operations" over "irregular routes". (R. 115–117.)

While the Commission was considering the kind of certificate to which Crescent was entitled, there were fifty-eight other applications pending before it, involving this same territory, type of operation, and the Commission's authority to describe the type of service which such operators should be granted. These cases were consolidated and were known as *Irving Nudelman Common Carrier Application et al.*, Docket No. MC–86772.

[4] The district court construed the "door-to-door" limitation as not preventing appellant from picking up passengers at its fixed stations in the Bronx or elsewhere (R. 30, 35).

In addition, the application of *Sullivan County Highway Line, Inc.*, Docket No. MC–29649, covered similar facts and involved the same question. As was recognized by the district court, the pendency of these cases before the Commission on formal records accounts for the delay in finally passing upon appellant's application (R. 31–32, 36).

On February 15, 1940, the Commission, Division 5, issued its decision in the *Sullivan County* case, finding that it was unable to accept the view "that a substitution of busses for sedans will change the character of the service to such an extent as to constitute an operation essentially different from that conducted on the statutory date." 21 M. C. C. 717, 722. Chairman Eastman disagreed with this view (at p. 724). On March 20, 1940, the Commission, Division 5, reached a similar conclusion in the *Nudelman* case, 22 M. C. C. 275, with Chairman Eastman again dissenting (at p. 285). However, both the *Sullivan County* and the *Nudelman* cases were reconsidered by Division 5, and on February 25, 1941, the Division issued a report on reconsideration in the *Nudelman* case, 28 M. C. C. 91, finding that the applicants therein were engaged in (1) special seasonal operations as common carriers by motor vehicle of passengers and their baggage, between New York City, or portions thereof, on the one hand, and Sullivan and Ulster Counties, New York, or

portions thereof, on the other, (2) over irregular routes through New Jersey, and restricted the authority to special operations in (3) non-scheduled (4) door-to-door service, limited (5) to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats. The *Sullivan County* case was also reconsidered by the Commission, Division 5, and was decided on August 2, 1941, 30 M. C. C. 133, the Commission reaching the same conclusion as its report on reconsideration in the *Nudelman* case.

On September 2, 1941, the order here under attack was issued (R. 115–117), the Commission, Division 5, merely substituting a designation of appellant's type of service rendered on June 1, 1935, and containing the above five restrictions, in conformity with its latest determination in the *Nudelman* case, in lieu of its previous description of the type of authority as contained in the order of June 20, 1938 (R. 103–105).

On October 10, 1941, appellant, the corporation succeeding to the interests of the partnership (R. 112), filed a petition to stay issuance of the September 2, 1941, certificate, requesting Division 5 to vacate the order and reinstate the compliance order of June 20, 1938 (R. 117–120). No issue was made therein as to the facts, nor was any request for further hearing contained in the

petition which was denied on March 17, 1942 (R. 131–132). On April 6, 1942, appellant filed a petition "for reconsideration by the entire Commission and/or to reopen and grant a hearing" (R. 132–136). After replies thereto had been filed by protestants (R. 136, 148) this petition was denied by order of July 13, 1942 (R. 158), whereupon this suit was filed on September 30, 1942 (R. 2–3).

The statutory court sustained the Commission's order in every respect. An appeal was taken to this Court; appellees filed motions to affirm; and on June 7, 1943, the case was transferred to the summary docket.

SUMMARY OF ARGUMENT

I

In granting a certificate under the "grandfather" clause of Section 206 (a), the Commission is to assure a "substantial parity between future operations and prior *bona fide* operations." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481. Such "substantial parity" would not be attained if appellant were permitted to substitute for the seven-passenger sedans operated prior to the "grandfather" date, buses carrying "thirty or forty passengers."

The statute authorizes the Commission in issuing a certificate to "specify the service to be rendered" by the carrier. Section 208 (a). Under this authority, and consistently with the evidence before it, the Commission could properly

designate appellant as a common carrier of passengers by motor vehicle, limited to (a) special operations, in (b) non-scheduled, (c) door-to-door service, (d) over irregular routes, of (e) not more than six passengers in any one vehicle, not including the driver or children under 10 years of age who do not occupy seats. *Noble* v. *United States,* 319 U. S. 88; *Royal Cadillac Service, Inc.* v. *United States,* 317 U. S. 595.

The proviso to Section 208 (a) contains no bar to the Commission's action herein. To construe the proviso in accordance with appellant's contentions would defeat the purposes of the Motor Carrier Act.

II

Through forms filed with the Commission in support of the application, together with information furnished by appellant in affidavits and otherwise, the Commission was fully informed of the facts concerning the operations involved. As the district court found, the evidence clearly justified the Commission's order.

III

In considering applications under the "grandfather" clause, the statute permits the Commission to adopt a practical way of disposing of the many applications before it and does not require a formal hearing. Thousands of such applications have been referred to the Commission's field

offices for the development of facts to enable it to dispose of the many pending cases. Appellant, without protest, appeared in this manner and introduced all the evidence it wished in support of its application. It was satisfied with the first order entered by the Commission on June 20, 1938, and made no complaint of procedural error until after the Commission modified its earlier order on September 2, 1941, following its decision in the *Nudelman* case. The Commission was free to change its order on the same record, both under the statute (sec. 221 (b)) and under decisions of this Court (*e. g., Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482).

ARGUMENT

I

THE COMMISSION PROPERLY LIMITED APPELLANT TO THE SAME KIND OF SERVICE THAT IT WAS CONDUCTING ON JUNE 1, 1935

Appellant filed an application under Section 206 (a) of Part II of the Interstate Commerce Act, which contains the "grandfather" clause, under which the Commission is authorized to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor in interest "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time." The purpose

of the "grandfather" clause (*United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481) "was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior *bona fide* operations.'" If there is a difference between the operations before and after the critical date, the operations are not a continuation of those commenced prior thereto, and the Commission must deny the certificate. Cf. *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 78; *United States* v. *Maher*, 307 U. S. 148, 155; see also *Royal Cadillac Service, Inc.* v. *United States*, 317 U. S. 595.

After informal proceedings in the New York City field offices of the Commission, at which appellant introduced considerable evidence (R. 62–83, 92, 94), the Commission issued to it a "grandfather" certificate authorizing the continuance of operations as a common carrier by motor vehicle of passengers and their baggage in a described area, limited to "special operations, in nonscheduled door-to-door service, * * * of not more than six passengers in any one vehicle, but * * * not including children under ten years of age who do not occupy a seat or seats,[5] during the

[5] In complaining (Br. 21–22) of the restriction of the Commission by which appellant is permitted, in addition to the driver and six passengers in any one vehicle, to carry such children under ten years of age as do not occupy a seat or seats, appellant misconstrues the action of the Commission. No child is deprived of a seat if a ticket is purchased. The restriction was intended to permit parents to carry small

season extending from June 1 to October 1, inclusive, over irregular routes"[5] (R. 116–117). It is appellant's claim (Br. 19–29) that the proviso of Section 208 (a)[6] entitled it to an unrestricted certificate, without particular reference to the type of service it had rendered on and prior to the "grandfather" date. Appellant believes that under this proviso it could substitute large buses

children on their laps if they desire. Whether there are too many children traveling to permit such an arrangement goes to the question of public convenience and necessity under Section 207 of the Act, and not to the propriety of a "grandfather" certificate.

[6] Section 208 (a) of Part II of the Interstate Commerce Act provides (49 U. S. C. 308 (a)):

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

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carrying thirty or forty passengers (Br. 5, 9, 21, 22) for the seven-passenger sedans operated prior to the "grandfather" date (R. 34).

The authority of the Commission to include restrictions of the kind involved here under its power to "specify the service to be rendered" (sec. 208 (a)) has been the subject of much consideration. As referred to in the Statement (*supra,* pp. 8–10), the Commission, Division 5, in the *Sullivan County* and *Nudelman*[7] cases, Chairman Eastman dissenting, first concluded that it had no authority to impose these restrictions. On reconsideration of those cases, Division 5 reversed itself.

By virtue of the final determination in the *Nudelman* case, the Commission, by its order herein of September 2, 1941, merely authorized the issuance of an appropriate certificate properly describing, upon all of the evidence and facts before it, the service rendered by appellant. Appellant does not dispute or deny the facts and method of its operation. It contends (Br. 19–29) that the order of September 2, 1941, limits the holder of the certificate to the use of sedans in contravention of that portion of Section 208 (a) which permits a carrier to increase its service as the demands of the business may require.

[7] The petition for rehearing in the *Nudelman* case, 28 M. C. C. 91, which is the leading case on the subject, was denied by the entire Commission on June 9, 1941.

In the *Nudelman* report, the Commission has fully discussed its position in respect thereto.[8] Simply stated, it merely means that once a certificate is issued, whether it be pursuant to Section 206 (a) ["grandfather" rights] or 207 (a). [new operations], describing "the service to be rendered" (sec. 208 (a)), then there shall be no limitation as to the *quantity* of that type of service. Speaking for the court below, Judge Learned Hand said in this connection (R. 34):

> No one suggests that the proviso to Sec. 308 (a) [208 (a)] authorizes the carrier to change the prescribed route, and there is as little reason for saying that it justifies a change in the service to be rendered. Unless that feature of the certificate is to become a dead letter, and the Commission is to be stripped of all power except to fix routes, the carrier cannot have power substantially to modify the quality of his service, however free he may be to "add" to it in amount; and certainly nothing can more directly touch the quality of transportation than the cars in which passengers are carried. Indeed, limitation as to the quality of the service was inevitable in the public interest: a line of light small passenger cars—like those here at bar—may be desirable, however numerous, over routes upon which a fleet of powerful, heavy,

[8] A portion of the Commission's second report in the *Nudelman* case is set forth in the Appendix, *infra*, pp. 39–42.

commodious, motor busses, capable of seating forty or fifty passengers, and weighing perhaps ten tons, would be wholly unsuitable.

The recent decision of this Court in *Noble v. United States*, 319 U. S. 88, supports the Commission's decision in this case. There, in dealing with a contract carrier, the Commission had imposed certain restrictive provisions under the authority conferred upon it by Section 209 (b) to specify in the permit "the business of the contract carrier covered thereby and the scope thereof," whereas in this case the language of the statute, Section 208 (a), requires the Commission to specify in the certificate "the service to be rendered" by the carrier. In sustaining the Commission's order, the Court said (319 U. S. at 91-92):

> * * * An accurate description of the "business" of a particular contract carrier and the "scope" of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type or class of shippers served. Unless the words of the Act are given that interpretation, permits under the "grandfather" clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodi-

ties for all comers, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that "substantial parity between future operations and prior *bona fide* operations" which is contemplated by the Act (*Alton R. Co.* v. *United States*, 315 U. S. 15, 22) would be frequently disregarded. The "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion, for all practical purposes, of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See § 206 (a), § 207, and § 209 (b).

The operations of appellant during the "grandfather" period are like those which this Court recently considered in *Royal Cadillac Service, Inc.* v. *United States*, 317 U. S. 595. The Court there affirmed, *per curiam*, an unreported decision of a three-judge court sustaining an order of the Commission denying a "grandfather" certificate to Royal Cadillac Service, Inc. That company, as the opinions of the district court and the Commission indicate,[9] had conducted operations in the Catskill area in seven-passenger sedans during the early part of the "grandfather" period. Those operations, like appellant's, were largely from door to door, with no fixed schedule, and following a fixed route for only that part of the journey between New York City and Wurtsboro, New York. Because Royal Cadillac subsequently during the "grandfather" period had changed its sedan operations to bus operations on a fixed schedule, between fixed termini, the Commission and the court held that there had been such a substantial change in the nature of the service as to break the continuity of the same type of service required for a "grandfather" certificate.[10] See *Gregg Cartage Co.* v. *United States*, 316 U. S. 74,

[9] The Commission's decision is reported in *Royal Cadillac Service, Inc., Common Carrier Application*, 30 M. C. C. 469.

[10] The "grandfather" clause requires that a carrier, in order to secure a certificate, must not only have been "in bona fide operation on June 1, 1935," but that it also shall have "so operated since that time" (sec. 206 (a)).

78; *United States* v. *Maher*, 307 U. S. 148, 155. As here, it was urged that the decision was erroneous on the ground that Royal Cadillac's right to add to its equipment, under the proviso of Section 208 (a), would be thereby restricted. However, this Court, in affirming, stated that such an argument raised no substantial question. *Royal Cadillac Service, Inc.* v. *United States*, 317 U. S. 595."

The difference between this case and the *Royal Cadillac* case is that here there apparently has been no change by appellant in the type of service rendered on and prior to the "grandfather" date. Accordingly, appellant is entitled to a certificate authorizing it to continue the same type of operations as it was performing on June 1, 1935. The power of the Commission to impose restrictions so confining appellant has been plainly granted by Section 208 (a). As was said in *United States* v. *Maher*, 307 U. S. 148, 155:

> The recognized practices of an industry give life to the dead words of a statute dealing with it. * * * Such recognition is implicit also in the provision of Section 208 (a) that "Any certificate issued

[11] The *per curiam* opinion stated that the only substantial question raised was whether, under Section 206 (a) of the Act, Royal Cadillac could continue operations until the determination by the Commission of its application for a certificate of public convenience and necessity. This question had become moot. No such question is involved in the present case.

> under section 206 or 207 *shall specify the service to be rendered* * * *". [Italics supplied.]

And in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 483, this Court said:

> By Section 208 (a) the certificate must specify "the service to be rendered" by the carrier. * * *

The Court quoted with approval (at p. 485) the following excerpt from the Commission's opinion in *Powell Brothers Truck Lines*, 9 M. C. C. 785, 792:

> Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service.

By its order here, the Commission has given appellant everything it possessed on the "grandfather" date and has effectuated a substantial parity between the authorized operations and the prior "grandfather" operation. *Alton R. Co.* v. *United States*, 315 U. S. 15. The "scope of the certificate" is for the "expert judgment of the Commission" and is the exercise of a function "reserved exclusively" for it. *United States* v.

Carolina Freight Carriers Corp., 315 U. S. 475, 489–490.

The prime purpose of the Motor Carrier Act of 1935,[12] expressed in its declaration of policy (Appendix, *infra*, p. 34), was to provide regulation and foster sound economic conditions in the motor-carrier industry in order to prevent chaotic conditions. See S. Rep. No. 482, 74th Cong., 1st sess., pp. 2, 3; S. Doc. No. 152, 73d Cong., 2d sess., p. 33. If appellant's interpretation (see pp. 15–16, *supra*) of the proviso to Section 208 (a) were accepted, carriers would be permitted to change their type of service as the demand arose without any proof of convenience and necessity respecting the changed type of service. Not only would the Commission be stripped of all power of regulating the service of common carriers by motor vehicle, except as to prescribing routes, by such an interpretation, but the competitive result would destroy all but the strongest carriers, particularly in metropolitan areas, where the sedan type of operations during the summer months is normally quite prevalent.

The facts in respect to appellant's method of operation on June 1, 1935, were developed in the evidence presented to the Commission, and they reveal that appellant was in fact engaged in a

[12] This Act (49 Stat. 543) was retitled Part II of the Interstate Commerce Act by the Transportation Act of 1940 (54 Stat. 919).

service which was properly described by the Commission as (1) "door to door"; as (2) non-scheduled; over (3) irregular routes;[13] in (4) special operations;[14] and (5) limited to the carry-

[13] The sharp distinction between irregular-route, territorial operations, and regular-route operations between fixed termini was recognized in *United States* v. *Maher*, 307 U. S. 148, 154–155.

[14] The Commission was required to impose the limitation as to "special" operations if any certificate at all was to be granted here, for Section 207 (a) contains a proviso "that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

The difference between "special" and "charter" operations is described in *Fordham Bus Corp. Common Carrier Application*, 29 M. C. C. 293, 297, affirmed, 41 F. Supp. 712 (S. D. N. Y.), where the Commission said:

"There remains for consideration applicant's second contention that both special and charter operations should have been authorized. The terms 'charter' and 'special' operations as applied to motor carriers of passengers under part II of the act are frequently confused and sometimes erroneously used as virtually synonymous. It is clear, however, that, properly employed, each identifies a particular and distinct type of service. Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier.

ing of six passengers and the driver. Judge Hand's opinion adequately explains these limitations and the authority of the Commission to make them (R. 31–36).

II

THE COMMISSION'S ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

In the forms filed by appellant's predecessor in support of its "grandfather" application, it set forth in detail the type of operation which it conducted and for which it sought authority (R. 43–54), even claiming that because sedans, rather than buses, were employed in its business, its activities fell outside the purview of the Interstate Commerce Act (R. 46). In Exhibit A attached to its application, the applicant asserted that its route was from New York City, via the George Washington Bridge, to Suffern and Wurtsboro, New York, where traffic was distributed to the Catskill summer resorts within a radius of twenty miles from Woodbourne, New York (R. 47–48).

In *Red Star Sightseeing Line, Inc., Common Carrier Application*, 1 M. C. C. 521, and in *Blue and Grey Sight Seeing Tours, Inc., Com. Car. Applic.*, 8 M. C. C. 124, the distinction between charter and special operations is clearly recognized, and in each case authority is granted to conduct exclusively special operations in round-trip sightseeing or pleasure tours. The same distinction has been consistently observed in numerous subsequent cases * * *."

Annexed thereto was a map[15] showing the New York area and the manner in which appellant traveled to the territory served by it. The area serviced was indicated by a large irregular circle drawn on the map. (R. 49.) Attached to the exhibits was an advertisement card which read in part (R. 80):

> 7 Passenger Cars Leaving Daily to All Parts of the Mountains At Lowest Prices [a number of destinations were listed] From Your Home to Your Hotel. Boarding and Rooming Accommodations if desired. Please Call to See Us at Our Residence About Reservation.
>
> CRESCENT MOUNTAIN SERVICE,
> *531 East 169th Street.*

Prior to the issuance of the compliance order of June 20, 1938, the application was referred to the district office of the Commission for further investigation and informal hearing and conference with the applicant. (See R. 97.) At the informal hearing before a District Supervisor, additional proof of operation was submitted in the form of affidavits[16] and oral statements (R. 62–83, 92, 94). The partnership's books, in the form

[15] On January 25, 1938, the applicant filed a supplemental Exhibit A, which contained another map clearly showing on its face that the applicant was a radial, irregular route, territorial operator (R. 59).

[16] Excerpts from the affidavits, which illustrate the service rendered by appellant's predecessor in the "grandfather" period, appear in the Appendix, *infra*, pp. 42–44.

of "diaries" showing reservations for passengers, were also introduced, indicating the manner in which the business was conducted. (See R. 62.) At no time were any schedules of operations produced, nor any proof of operation of a regular-route terminal to terminal operation, nor any advertisements, "holding-outs," leases, or other evidence indicative of such an operation.

Upon this proof, the Commission issued the compliance order of June 20, 1938 (R. 103–105), to which exceptions were filed by protestant bus carriers (R. 105–111). Thereafter, the proceedings were referred back to the Commission's district office for further informal investigation (see R. 110), and appellant's predecessor was requested to attend an informal conference on December 1, 1938. (See R. 121, 31.) At this conference, no additional data was submitted beyond that originally given to the District Supervisor (R. 122, 31); that data consisted of evidence of seven-passenger sedan movements over irregular routes in a door-to-door service, between points in New York City and specific points in Sullivan and Ulster Counties, New York.

Appellant's claim (Br. 30–33) that its operations were regular-route operations[17] is so contrary to the undisputed facts that it is only necessary to refer the Court to the application (R. 43–52) and the supporting affidavits (R. 63–76),

[17] See fn. 13, p. 24, *supra*.

indicating the type of "grandfather" service rendered.

There was no contested hearing in this case, and the only evidence submitted was that of the applicant.[18] The affidavits stress the distinctive and special type of service rendered by Crescent Mountain Service during the "grandfather" period and reflect the furnishing of a type of travel distinct from that furnished by regular train or bus travel, a type which, as the affidavits disclose, had its special advantages in convenience and flexibility. And the affidavits definitely disclose also that appellant's predecessor operated a special, non-scheduled, door-to-door, radial, irregular-route operation, conducted with vehicles carrying not more than seven passengers including the driver (R. 63–76). See Appendix, *infra*, pp. 42–44.

Thus, Crescent's own uncontradicted proof is the substantial evidence supporting the Commission's order, and the district court properly held that the order was "adequately supported by evidence" (R. 29).

[18] Protestants offered no evidence because of their view that the applicant sought only the right to continue its special door-to-door, radial, irregular-route, territorial operations, conducted with vehicles carrying not more than seven passengers including the driver. As long as it was engaged in this type of business alone, the applicant obviously did not compete with the opposing bus carriers.

III

APPELLANT WAS ACCORDED A FAIR HEARING

In the administration of the Act, the Commission has disposed of many "grandfather" motor carrier applications through the medium of informal hearings in its district offices.[19] The Act permits the Commission to adopt a practical way of disposing of the many applications before it. Section 204 (a), (6) (49 U. S. C. 304 (a) (6)). It must be remembered that the only evidence presented to the Commission in this case was by appellant or its predecessor. No counter-testimony was introduced by protestants, who were not opposed to appellant's being given a certificate covering the type of service rendered on June 1, 1935. Since the certificate authorizes operations similar to those this evidence shows appel-

[19] As pointed out by this Court's decision in *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 84, "the Commission had nearly 90,000 applications to pass upon under Section 206 (a) * * *." It was essential for the Commission to adopt a procedure, including reference to its field forces for investigation of the facts, under which it could "act on the pending applications with the least possible delay." 51st Annual Report of the Interstate Commerce Commission, p. 71 (1937). "Grandfather" applications, the Commission stated, "are being handled by an informal conference method to a very large extent. Only those which are too complicated or controversial for such handling are set for hearing." A table in the report reveals that 24,541 applications had so far been referred to the field force. (*Ibid.*)

lant was conducting on the "grandfather" date, no just cause of complaint appears.

In addition, the record in this case reveals that appellant had a hearing and even considered that it had a hearing (R. 94–97). In March 1938, the Commission directed a rule to show cause to issue against Crescent Mountain Service (the predecessor partnership) and a number of other carriers calling attention to the fact that they had failed to furnish information or evidence necessary to dispose of their applications, and ordering them within 30 days, at the risk of dismissal, to do so (R. 89–91). Crescent Mountain Service's attorney, Mr. Milton Cotton, on March 19, 1938, filed with the Commission an affidavit, appearing in the record in this case, disclosing his appearance before the local officers of the Commission where he submitted facts in support of the application (R. 94). And on March 18, 1938, Mr. Cotton had written a letter to the Commission stating that he and his client had theretofore submitted evidence in support of the "grandfather" application, which the Examiner thought was "proper and sufficient" (R. 92–93). Under date of May 4, 1938, he wrote another letter saying he had, pursuant to instructions, "contacted the New York District office, and thereafter a hearing was had and evidence submitted relative to the preservation of applicant's rights under the 'grand-

father' clause" (R. 97). Also, the District Supervisor advised appellant on October 31, 1938, that because of protests against the June 20, 1938, order, an informal "rehearing" with respect to appellant's rights would be held on December 1, 1938 (see R. 121, 31). No new facts were developed at this rehearing (R. 122, 31), and the final disposition of the questions involved was not made until after the *Nudelman* case was decided. As the district court said: "Finally, we can see nothing improper in the procedure adopted by the Commission in changing its decision; it acted upon the same record and after notice to the plaintiff of a new hearing" (R. 35–36). Furthermore, following the order of September 2, 1941, appellant protested and submitted a written petition and argument (R. 117–120) to Division 5, which were rejected (R. 131–132). Then it appealed by petition and written brief (R. 132–136) to the entire Commission, which denied this petition for rehearing (R. 158). It is therefore obvious that appellant was accorded a hearing.

Appellant's assertion (Br. 39–41) that the Commission could not alter the June 20, 1938, order without another hearing is without merit. As appellant was proceeding under the "grandfather" clause, the Commission, before issuing a certificate thereunder, was obliged to ascertain in such manner as was reasonable and lawful the.

extent of the service rendered, and appellant, having had two opportunities at informal conferences of submitting data to support its application, was plainly deprived of no rights. As successor to the partnership, appellant, by the order of September 2, 1941, was awarded a certificate properly descriptive of its operations on June 1, 1935. Its view really is that the June 20, 1938, order accords with due process because it gave appellant what it sought, whereas the September 2, 1941, order contains procedural defects because a different authority was thereby granted. However, the Commission, like a court, on reconsideration of the original record, was perfectly free to change its mind. Cf. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482; *New England Divisions Case,* 261 U. S. 184, 187; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 218 (E. D. Pa.), affirmed, *per curiam,* 317 U. S. 587. Furthermore, Section 221 (b) of the Act (49 U. S. C. 321 (b)) provides that all orders of the Commission "shall continue in force until its further order, or for a specified period of time, * * * unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

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NOVEMBER 1943.

APPENDIX

Section 202 (a) (the declaration of policy) of the Motor Carrier Act, 1935, c. 498, 49 Stat. 543, provides:

> It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

The Interstate Commerce Act, Part II, c. 498, 49 Stat. 543, as amended, provides:

Section 203 (a) (13):

> The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical

power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service. (49 U. S. C. 303 (a) (13).)

Section 204 (a):

It shall be the duty of the Commission—

* * * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and (49 U. S. C. 304 (a)).

Section 206:

(a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in

bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect [October 1, 1935], and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which, is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission. (49 U. S. C. 306.)

Section 207 (a):

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a

regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations. (49 U. S. C. 307 (a).)

Section 208 (a):

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require. (49 U. S. C. 308 (a).)

Section 221 (b):

Except as otherwise provided in this part, all orders of the Commission shall

take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. (49 U. S. C. 321 (b).)

The second report of the Interstate Commerce Commission in *Irving Nudelman Common Carrier Application, et al.*, 28 M. C. C. 91, 93–95, provides in part:

> Upon further consideration we are of the opinion that our prior construction of section 208 (a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, "the service to be rendered," subject to the proviso that we cannot restrict the right of a carrier "to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require." In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitations to the quantity of the service to be furnished. This construction is in line with our decision in *Pittsburgh-Weirton Bus Co., Inc., Com. Car. Application*, 10 M. C. C. 266, wherein we discussed the meaning of the proviso in question. In that case, the issue was presented as to whether that applicant had inaugurated a new operation by increasing its service between 2 points from 1 round trip daily to 250 one-way

trips daily. In deciding that question in the negative, we construed the proviso of section 208 (a) to mean (page 270):

"This prohibition protects the right of the carrier to expand not only its 'equipment' but also its 'facilities.' The only purpose of such expansion is to enable the carrier *to provide more service,* and this is very clearly indicated by the words 'as the development of the business and the demands of the public shall require.' It follows that 'terms, conditions, or limitations' in the certificate restricting *the service* of the carrier would be wholly inconsistent with this proviso." [Emphasis supplied.]

We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the service to be rendered. What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its service to meet the demands of the public.

With this exception, our power to specify in any certificate we issue the service to be rendered is complete. For instance, in *Schwerling Common Carrier Application,* 23 M. C. C. 459, we required the applicant carrier to maintain a schedule of not less than one round trip per hour during certain periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment. For example: In *Miller Extension of Operations,* 21 M. C. C. 401 (prior report, 12 M. C. C. 457), the authority granted therein was restricted to liquid petroleum products in

tank trucks; in *Myers Common Carrier Application*, 23 M. C. C. 451, authority was restricted to drive-away service; in *Central Truckaway System, Inc., Com. Car. Application*, 19 M. C. C. 713, authority was restricted to truck-away service; in *Parcel Delivery Service, Inc., Contract Carrier Application*, 8 M. C. C. 275, authority was granted to transport packages and parcels of merchandise by motor vehicle "the equipment being limited to motorcycle traffic cars, with panel bodies"; in *Billy Baker Co. Common Carrier Application*, 24 M. C. C. 805, authority was granted to transport, among other things, cement in dump trucks; and in *Barrows Common Carrier Application*, 19 M. C. C. 179, authority was restricted to the transportation of not more than six passengers per trip. Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted.

Because we have the power to restrict a carrier to the use of certain types of vehicles, in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits.

Excerpts from affidavits filed with the Commission by appellant's predecessor, Crescent Mountain Service, in support of its "grandfather" application:

1. Reuben Freed, restaurant owner, of South Field, N. Y.

> The reason for their ——— service is that they transport people to hotels located in

all roads and by-roads, obviating the necessity of their passengers having to use foot or other extraordinary means to get to their actual destination (R. 64).

2. Harry K. Cohen, hotel owner, of Woodbourne, N. Y.:

> I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman doing business as Crescent Mountain Service since May, 1932. Their business has been the transportation of guests of mine from New York City to my hotel and from my hotel to New York City (R. 67).

3. Moe Bail, hotel owner, of Woodbourne, N. Y.:

> We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City and from New York City to our hotel * * *. I have also been transported by them from my hotel to New York City * * *. During my passage I noticed that they have picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City * * * (R. 67, 68).

4. Issi Feldman, hotel owner, of Woodridge, N. Y.:

> They operate seven 7 passenger Sedans and carry passengers to and from summer hotels located in Sullivan and Ulster Counties. * * * The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of transportation to and from my hotel since 1932 * * *. I sincerely believe that their mode of transportation is

extremely necessary and convenient both for my own and my guests' needs (R. 68–69).

5. Israel Levine, lessor of applicant's New York City office:

> I have personally seen them arranging for said trips with passengers * * * (R. 69).

6. Adela Dingenthal, of the Bronx, New York City:

> In the summer of 1933 and in the summer of 1934 I hired the aforesaid persons [the applicants] to transport me and my family from their office * * * to Accord in the County of Ulster * * *.
>
> * * * My family and I have personally found that this method of transportation is most convenient and the most economical for our purpose * * * (R. 71, 72, 73).

7. Edna Livingston, of the Bronx, New York City:

> Riding with us at the times that we were transported to North Branch, New York by the aforementioned Crescent Mountain Service were other passengers who were transported to various other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake (R. 73, 74).

8. Harris Trevax, the father of one of the applicant partners:

> My wife and I helped him out by answering phone calls and booking work (R. 75).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

CRESCENT EXPRESS LINES, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., *et als.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR HUDSON TRANSIT LINES, INC., APPELLEE.

JAMES F. X. O'BRIEN,
Attorney for and of Counsel with Appellee, Hudson Transit Lines, Inc.

Dated: November 1, 1943.

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Opinion Below.

The opinion of the District Court, written by Circuit Judge Learned Hand (R. 30-36), is reported in 49 F. Supp. 92.

Jurisdiction.

The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (28 U. S. C. 45a, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and

Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)).

The final decree of the District Court was entered March 6, 1943 (R. 49), and petition for appeal and order allowing it was filed April 16, 1943 (R. 36).

Statement of Case.

This appellee will accept and rely upon the detailed Statement of Case in the brief of the United States of America and the Interstate Commerce Commission. It, however, desires to roughly outline the prior proceedings in order to correct any erroneous impression which might arise from appellant's Statement of Case.

Appellant's predecessors were engaged in a specialized type of passenger transportation which might well be called interstate livery service. They were so engaged on June 1, 1935, and filed application with the Interstate Commerce Commission as Grandfather claimants seeking a certificate to continue their prior service (R. 43-54). Failure to prosecute their application caused the Commission to call them to informal hearing by letters (R. 55-56). They appeared at informal hearing and presented proof in questionnaire form (R. 57-58), a map showing their operations (R. 59), and proof of their prior operations and continuance thereof in the form of affidavits (R. 62-76), and circulars used by them showing their highly specialized type of service (R. 77-83). Based on the informal hearing and the proof submitted by applicant, there being no proof submitted by any protestant, the Commission issued a compliance order May 7, 1938 (R. 99-100), which inadvertently specified their service as a regular route service, and which, if it became effective, would permit an operating authority exceeding that applied for and proven by applicant's own evidence.

This was not a certificate but a mere compliance order which, by its terms, permitted interested parties to protest it within thirty days after its date (R. 100). Such protest in the form of exceptions and petition was filed within the thirty days (R. 101-103). The Commission issued a corrected compliance order, not in response to the protest, but to correct typographical errors, which compliance order was dated June 20, 1938 (R. 103-105). Immediately thereafter protests were filed within thirty days from the date of that order (R. 105-109). The orders never became effective, and the Commission notified all parties that the objections warranted a further investigation of the case, and it was referred to the field for that purpose (R. 110-111).

On page 3 of appellant's brief, it creates the impression that, after the order of June 20, 1938 was issued, nothing further happened until the Commission on September 2, 1941 issued the order from which appellant has appealed in these proceedings. This is not so, as indicated by the statements above showing the protests against the order and the reference of the matter for further investigation.

In addition, appellant neglects to state that during this period of time the question of the Commission's right to fully and adequately specify the service to be rendered by specifying among other things the type of vehicle to be used, was being litigated before the Commission. This litigation extended over a period of years, before Examiners of the Commission, before Division 5 of the Commission, and before the Commission as a whole.

After an incorrect interpretation of its statutory rights, the Commission finally on reconsideration fixed and determined the applicable law. This was in the case of *Irving Nudelman*, Common Carrier Application, reported

in 28 M. C. C., page 91, and decided February 25, 1941, by Division 5 of the Commission, which decision was affirmed without additional opinion by the Commission as a whole.

After this law had been fixed and determined in 1941, the Commission was in a position to issue a proper compliance order based on the uncontested facts in the Crescent application. It proceeded to do so, and specified applicant's service so as to permit it to render the same type of service it had rendered on and prior to the Grandfather date (R. 115-117). Appellant protested this order before Division 5, and submitted written argument in brief form (R. 119-120). There were replies to this brief (R. 121-131), and, after Division 5 had rejected the argument and denied the petition (R. 131-132), applicant filed further protest and submitted written argument in brief form (R. 132-136) to which replies were again made (R. 136-158). The last argument of applicant was addressed to the Commission as a whole, which rejected its argument by order issued March 17, 1942 (R. 158). Applicant again petitioned the Commission as a whole for further consideration (R. 158), which petition was considered and relief under it denied (R. 167).

In all of its protests above mentioned, applicant never claimed it had other facts to present above and beyond those it had already presented to the Commission at the informal hearings, and in its argument in support of its protests applicant argued questions of law opposing the legal interpretations adopted by the Commission in the *Nudelman* case. Appellant's objections related not to factual issues but to legal issues, to wit, the Commission's power to apply to the undisputed facts of the case the legal interpretations which were applied in line with its final determination in the *Nudelman* case.

Appellant filed complaint in the District Court which,

after oral argument and briefs, handed down a written decision (R. 30-36), which is a clear, concise statement of the fact and the law of the case. A decree and findings of fact and conclusions of law (R. 28-29) were entered, and appellant has appealed to this Court.

The Issues.

The underlying issue is a simple one.

Appellant does not want to be restricted by the Commission's certificate to an authorized service having a substantial parity with its prior bona fide Grandfather operations. It is not satisfied with authority which permits the type of service conducted by it on and prior to the Grandfather date. It wishes authority which will permit it to conduct a type of service never rendered by it on and prior to the Grandfather date. It objects to the Commission's specification of service which produces the substantial parity between the prior bona fide operations of appellant and the future authorized operations. Although given all that it asks in its applications, and although permitted the very type of service its own proof disclosed it rendered on and prior to the Grandfather date, appellant is not satisfied. It wishes to enter into a new field of competition and wants the same kind of a certificate issued only to regular route scheduled bus operations.

The issues appellant presents in support of the underlying issue appear to be three-fold.

First Issue:

Appellant contends that the proviso at the end of Section 208(a) of Part 2, Interstate Commerce Act, (and which Section is Section 308(a), Title 39, United States

Code), prohibits the Commission from specifying the service to be rendered in terms of the vehicle to be used.

Second Issue:

Appellant contends that in specifying the service to be rendered, the Commission has no right to define it as irregular route, door to door, non-scheduled, special service, because the statute does not contain an authorization to the Commission to use such a definition.

Third Issue:

Appellant contends that the Commission had no right to enter its order of September 2, 1941, from which appellant appeals, because no factual hearing was held between that date and the date of its prior compliance order, June 20, 1938, which said 1938 order was protested with the result that the matter was referred for further investigation. Appellant contends that since protests were filed to its application, the Commission erred in not giving protestants a hearing, and erred in accepting the undisputed evidence submitted by appellant itself.

Summary of Argument.

Point I.

The Commission and the Court below interpreted United States Code, Title 39, Section 308(a) (Section 208(a), Interstate Commerce Act, Part 2), so as to require the Commission in issuing its certificate to define and specify the service it authorized appellant to render so as to assure a substantial parity between that authorized service and appellant's prior bona fide Grandfather service. They held that the proviso at the end of this

paragraph, which declared no restrictions should be imposed upon the right of a carrier to add to its equipment and facilities within the territory specified in the certificate as the development of its business and the demands of the public required, did not ham-string the Commission in such a way as to prevent it from fully carrying out the legislative mandate set forth at the very beginning of the same section, which required the Commission to specify the service to be rendered and the routes or territory within which it could be rendered, when the Commission issued a certificate authorizing operations. They held that it did not prevent the Commission from restricting appellant to the same type of service it had rendered on the Grandfather date, and held that the proviso referred to the quantity of the service which could be given as the demands of the public and the business in the territory increased, and that the proviso had no reference to the quality or character or type of service. These holdings are supported by an examination of the particular Section, by an examination of the preamble of the Motor Carrier Act, 1935, with particular reference to the expressed purpose of the Act as originally contained therein, and by reference to the interpretations of the Act in this Court in the cases of—

United States v. Maher, 307 U. S. 148;
United States v. *Carolina Freight Carriers Corporation*, 315 U. S. 475;
Noble v. *United States*, 319 U. S. 88, 63 Supreme Court Reporter 950.

The interpretation of the Commission and the Court is the only one which can carry out the purpose of the Act, and is the only reasonable interpretation when considered in the light of the entire Section of the Act involved, and when that Section is considered in the light of the entire Act.

Point II.

The Commission could not carry out its legislative mandate if it were not permitted to specify and define the authorized service in such a way as to actually and fairly define it in the terms of the type of service rendered by appellant on and prior to the Grandfather date. The record adequately supports the action of the Commission in its definition of appellant's service as the same is contained in the order of September 2, 1941 (R. 115-117).

Point III.

The Commission accepted the undisputed testimony of appellant, as contained in its predecessor's applications, and as contained in the evidence submitted by it at the informal hearings. To these undisputed facts, it applied the law as it was determined and as it existed on September 2, 1941. This was its obligation in line with the holdings of this Court in the case of—

Ziffrin, Inc. v. *United States*, 318 U. S. 73, 63 Supreme Court Reporter 465.

Argument.

POINT I.

Appellant bases its main claim on appeal to the proviso appearing at the end of Section 208(a) of Part 2, Interstate Commerce Act. This is Section 308(a) of Title 39, United States Code, and reads as follows:

"Sec. 308. (a) Any certificate issued under section 306 or 307 shall specify the service to be rendered,

and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificates such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, the requirements established by the Commission under section 304 (a) (1) and (6): Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Appellant claims that the proviso at the end of the above section permits it to add vehicles of whatever type may be reasonably necessary as its business and the demands of the public may require. It contends that this right to add to its equipment and facilities is not a mere right to give as much additional service as the business and the public demand requires. It contends that it has the right to add vehicles of any kind, even though the effect of using a different kind of vehicle would be to radically change the type of service theretofore rendered by it. It therefore contends that the Commission, in carrying out the mandate to "specify the service to be rendered" as set forth in the very beginning of the above Section 308(a) is limited, and that the Commission cannot specify the service to be rendered and include in that definition the type of vehicle to be used, even where it is

necessary to specify the type of vehicle to be used in order to adequately and fully specify the service to be rendered.

The logical conclusion of appellant's contention is that even if the change in the type of vehicle were to work a complete change in the type of service, none the less the Commission is powerless to define the service in such a way that this change could not take place.

Such an interpretation is at odds with the clear intent of the section when it is read as a whole.

Once the Commission has carried out its mandate by specifying the service to be rendered, then it cannot restrict the carrier from adding to its facilities in order to give as much more of that type of service as its business increase and the public demands may require. That is the only reasonable interpretation of the Section.

When this section is considered in the light of the entire Act, and particularly in the light of the expressed purposes of the Act as contained in Section 202 (a), which was the declaration of policy contained within the Act prior to its revision in 1940 under the title "Transportation Act of 1940," we see that the Commission and the Court were entirely correct in their interpretation, and that appellant's claimed interpretation is necessarily wrong. That declaration of policy declared it "to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation."

This Court has held in the cases of—

Price v. *Forest*, 173 U. S. 410, and
Rector v. *United States*, 143 U. S. 457,

that the preamble may be referred to in order to ascertain the legislative intent, and that the Court will con-

sider the evil intended to be remedied in seeking the correct interpretation of an Act.

Likewise this Court has held that the objects and policy of the law will be considered in interpreting it, and that the entire statute must be considered rather than giving an undue effect to particular words or clauses, and also that the intent of the law may not be defeated by rigid adherence to the strict letter.

Helvering v. *New York Trust Co.*, 292 U. S. 455;
Costanzo v. *Tillinghast*, 287 U. S. 341;
Barrett v. *Van Pelt*, 268 U. S. 85;
Fleischman v. *United States*, 270 U. S. 349.

The intent of the law cannot be carried out and sound economic conditions in the industry cannot be fostered if the proviso in Section 308 (a) is interpreted so as to permit a carrier to add different types of vehicles which will have the effect of changing the type of service previously rendered by it. When this happens, it enters into new competitive fields without any proof of necessity and convenience. Congress intended to permit Grandfather carriers to carry on the same type of service operated by them on June 1, 1935. It did not and could not have intended to permit them to change that type of service without proving necessity and convenience therefor. Section 306(a) of Title 39, U. S. Code, merely permitted continuance of prior bona fide operations without having to prove convenience and necessity therefor. Obviously, since it dispensed with that proof, the operations permitted to be continued could only be the same as the prior bona fide operations. Chaos would result if carriers were free to change their type of service and enter into new competitive fields. The Commission, in effect, would have but little authority over Grandfather carriers, if appellant's contention were correct.

Appellant's contention, carried to a logical conclusion, may be illustrated as follows:

Frequently motor bus carriers are permitted and authorized to carry express parcels in the same bus with passengers. Assuming appellant to be correct, if this parcel express business increased, such carrier could purchase a truck and run it behind the bus to carry these parcels and express. If it could do that, it could run the truck independently. Then it might obtain quantities of oil in tins or drums and carry such packages as express. Then, if demand arose, it could carry such oil in bulk in tank wagons. Thus, we would have a passenger bus carrier stretching his Grandfather authorization to carry parcels and express into the general competitive field of truck commodity carriage and into the other general field of tank wagon bulk carriage. All of these are separate fields of endeavor, all regulated and confined to their own spheres under the law as presently interpreted by the Commission, but if appellant is correct all of the thousands of Commission orders and decisions which constitute the basis of its motor carrier regulation would substantially fall. Any interpretation which would produce such an unreasonable effect, which would destroy the whole intent and purpose of the statute, cannot be the correct interpretation.

This Court held in the case of—

United States v. *Maher*, 307 U. S. 148, at p. 155, in referring to the pertinent section above quoted:

> "That any certificate issued under Section 206 or Section 207 shall specify the service to be rendered."

This Court also held in the case of—

United States v. *Carolina Freight Carriers Corporation*, 315 U. S. 475,

that:

> "As we indicated in *Alton R. Co.* v. *United States*, *supra*, the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial' parity between future operations and prior bona fide operations. * * * And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed. That is not this case."

In the case of—

Noble v. *United States*, 319 U. S. 88, 63 Supreme Court Reporter 950,

this Court passed upon a point which, by analogy, disposes of appellant's appeal. That was a case like the present one in which the Commission at one time had followed an erroneous view of the law and had corrected it and specified in the authority issued the type of business permitted under that authority. It limited the authority to that corresponding with the Grandfather operations. In rejecting a claim similar to the claim of appellant herein, the Court said:

> "Unless the words of the Act are given that interpretation, permits under the 'grandfather' clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for

a select few would be treated as a carrier of general commodities for all comers, merely because he had carried a variety of articles. * * * If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior bona fide operations' which is contemplated by the Act would be frequently disregarded. *The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935.*" (Italics ours.)

The interpretation of the Act by this Court supports the interpretation of the Commission and the Court below.

The Commission found it necessary, in the type of operation such as conducted by appellant; to define and specify the service to be rendered in terms of the vehicle used, as well as in other terms. This was clearly indicated in the Commission decisions in the case of—

Sullivan County Highway Application, 21 M. C. C. 717,

and in the Commission's decisions in the application of—

Irving Nudelman (and fifty-eight other operators), 28 M. C. C. 91.

Appellant's operations were not only the same type of operations as those covered by the Commission's decisions above mentioned, but were between the same territories, and the Commission had merely withheld final authorization to appellant and others in a similar category until it had passed on the legal questions which arose in the first batch of such cases heard by it.

Before the Commission came to the correct interpretation of the law, Commissioner Eastman, in his dissenting opinion in the *Sullivan County* case, 21 M. C. C. 717, said:

> "I think it clear that the character of service which was rendered on and before the Grandfather date was differentiated by the use of the vehicles of the sedan type. * * *
>
> Applicant should, I believe, be restricted to the use of vehicles of the sedan type."

Likewise, the Commission in the case of—

> *Irving Nudelman*, Common Carrier Application, 28 M. C. C. 91,

said, at page 95:

> "Because we have the power to restrict a carrier to the use of certain types of vehicles in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits."

At the same page, in discussing the operations therein, which were the same as appellant's Grandfather operations, the Commission said:

> "Motor vehicles having a capacity of seven passengers or less are peculiarly suitable for this type of operation."

On the same page, the Commission stated that the type of service in question was materially different from that performed by operators utilizing buses in regular route, scheduled operation between fixed termini.

The Crescent application shows that seven passenger sedans were the only vehicles operated by appellant's

predecessors on and prior to the Grandfather date. The supplemental application filed March 26, 1937, in Exhibit A, V, (a) and (b), indicates that the only vehicles owned and used by Crescent were six sedans (R. 48). Likewise, the affidavits used by appellant's predecessors to prove their operations indicated that only such vehicles were used (R. 64-76) as does also the Exhibit offered by them and filed with the Commission at that time (R. 78). Appellant does not contest this, and in fact admits on page 19 of its brief that "it used motor vehicles in its operations. These vehicles were of the sedan or limousine type seating seven persons."

The Commission has held that Sections 206(a) and 208(a) (United States Code, Title 39, Sections 306(a) and 308(a)) must be read together.

In the case of—

Dominick Machise, Common Carrier Application, 27 M. C. C. 668,

the Commission said:

> "The two sections are linked in subject matter, and must be read together. • • •
>
> The service rendered by a motor carrier involves a number of considerations, including such factors as commodities transported, *equipment used*, and degree of specialization in particular phases of motor carrier transportation. • • •
>
> Any other conclusion would not only disregard the difference in the essential characteristics of the two types of service, but also would be contrary to the national transportation policy, which requires us to foster sound economic conditions in the motor carrier industry." (Italics ours.)

In both the *Noble* case and the *Carolina Freight Carriers* case, above cited, this Court held that the precise

delineation of an enterprise which seeks the protection of the Grandfather clause has been reserved for the Commission, and that the scope of the certificate entails a weighing of the evidence and the exercise of an expert judgment on the intricacies of the transportation problems involved, and that such function is reserved exclusively for the Commission. Thus, when the Commission determines it necessary to specify the type of vehicle to be used in order to fully and adequately carry out its legislative mandate to specify the service to be rendered, it is acting within its authority as found and determined by the interpretations by this Court of the pertinent statutes.

On page 5 of its brief, appellant claims that the phraseology of the Commission's Order (R. 116-117) permits appellant to operate a forty passenger bus but only to carry six people therein. This is a ridiculous contention as is its contention, page 19 and page 24 of its brief, that the Commission was seeking by indirection to do what it had no legal right to do, to wit, define a service to be rendered, among other things, in terms of the type of vehicle to be used. The obvious intent of the phraseology used by the Commission was to restrict appellant to the same personalized flexible type of service which it had rendered on and prior to the Grandfather date, and which type of service could not be rendered with larger vehicles. The reason for the use of phraseology limiting the carriage to six passengers rather than to a sedan is explained when reference is had to the Commission's decision in the *Nudelman* case, 28 M. C. C. at page 96. There the Commission said:

> "Although they heretofore have conducted the operations in automobiles of the sedan type and the record indicates that they desire to conduct the op-

erations with this type of vehicle, we do not agree that they should be limited to the use of such vehicles. Such limitation would prevent them from using open cars or so-called beach and station wagons, although such vehicles might be as well adapted to their particular type of service as automobiles of the sedan type. We believe, however, that in view of the evidence offered by applicants and the nature and type of the operations under consideration, any authority granted herein should be limited in such a way as to prevent them from instituting a service competitive with those of protestants and other common carriers, and different from that which they have been performing and which the record shows they desire to perform. In the circumstances, we conclude that any authority granted herein shall be restricted to the transportation of passengers and their baggage, in special operations in non-scheduled, door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof and not including children under ten years of age who do not occupy a seat or seats. This, in effect, limits the service to be rendered to certain types of vehicles and, at the same time, makes possible a more flexible form of authority which specifies as completely as necessary *the kind or character of 'the service to be rendered'*." (Italics ours.)

Appellant's claim on page 11 of its brief that the Commission sought to restrict a carrier from using a different type of vehicle, even though such use would not change the character or type of the service theretofore rendered, is without basis in view of the Commission's determinations that in the particular type of service rendered by appellant the type of vehicle constitutes such an integral part as to be required in any definition or specification of service.

In this kind of case, the change in type of vehicle could not help but produce a change in type of service.

A taxicab operating on the streets of New York can carry people up and down Fifth Avenue, but if it changed from the taxicab type of vehicle to a bus, it could not help but change the type of its service, even though it still carried people up and down Fifth Avenue. Such is the case here.

Reference to the affidavits constituting the proof submitted by appellant's predecessors (R. 62-76 inclusive) shows that appellant's predecessors on the Grandfather date operated a highly specialized service, personalized and flexible, through the use of sedans, and different from the regular route bus operations.

On page 10 of its brief, appellant quibbles over the use by the court below of the word "quality" in referring to its type of service. The Court used the word "quality" to differentiate from the word "quantity" or amount of service which might be given. Its use of the word "quality" was used in the sense of character or type in referring to the service rendered. It was not used in the sense advanced by appellant in its quibbling argument on page 10 where it would interpret the Court's use of that word in the light of pleasing or satisfactory service.

Appellant is seeking to force from the Commission a certificate containing a specification of service which would permit appellant to inflate its prior Grandfather claims into a totally different type of service in an entirely different competitive field. To permit this would be to defeat all regulation by the Commission. To permit it would be to destroy eight years of work, during which the Commission has succeeded to a substantial degree, through its regulation, in bringing about sound economic conditions in the motor carrier industry.

The interpretation of United States Code, Title 39, Section 308(a), as made by the Commission and the Court below is correct.

POINT II.

United States Code, Title 39, Section 308(a), (Section 208(a), Interstate Commerce Act, Part 2), not only directs the Commission in issuing a certificate to specify the service to be rendered but further provides:

> "* * * and there shall, at the time of issuance, and from time to time thereafter, be attached to the exercise of the privileges granted by the certificates such reasonable term, conditions and limitations as the public convenience and necessity may from time to time require."

Appellant objects to the Commission's action in carrying out its legislative mandate wherein the Commission, in order to properly define and specify the service to be rendered of necessity had to define it in terms of the type and character of appellant's Grandfather service.

Appellant's objections run to the definition or specification of service which in effect declares that the Grandfather operations of appellant were over irregular routes, and was a non-scheduled, door to door special service.

That appellant's Grandfather service, and therefore the type of service which it is entitled to continue, was an irregular route operation is clear from its very application. Its supplemental Exhibit A-2-a (R. 49) definitely stated that it carried passengers from the territory comprising the Borough of Bronx in the City of New York, to the Counties of Sullivan and Ulster in the State of New York, via New Jersey, and stated that the area of destination in those upper New York State Counties was

that part of the said Counties "within a radius of twenty miles from the Town of Woodbourne, New York." That same Exhibit (R. 49) shows a map prepared by the applicant and filed with the Commission, which shows the area of distribution of passengers by a large irregular circle. That Exhibit was filed in connection with the supplemental application filed March 26, 1937. The applicant at a later date in a further supplemental Exhibit A-a-1, on January 25, 1937, filed another statement and map (R. 49) which made the same statement, and which map contained the same area of distribution of passengers. In addition, the affidavits submitted to the Commission by applicant (R. 64-76) showed the irregular route type of operation in which applicant carried passengers from the area comprising the Bronx in the City of New York, and any place therein, to any place in the mountains within a radius of twenty miles from Woodbourne. Such an operation is a radial, irregular route operation and cannot be considered a regular route operation between fixed termini because a regular route operator not only must operate between the fixed termini, but it can never leave its regular route except in case of accident or emergency. Appellant and its predecessors could and have carried passengers in their special operations to whatever point the passengers desired to go within the territory served.

Appellant argues in its brief, on page 7, and again on pages 30 to 33, that in order to get from the New York territory to the mountain territory, there is only one route through New Jersey and to upper New York State as far as Wurtsboro. This is not so, because there are parallel roads all the way, but it is true that the most practical way for appellant to operate would be over the direct route, which would mean that in most cases in serving the territories at each end, one road would be

used for part of the interim trip. This in no way changes the fact that the operation is not a regular route operation, but is instead a radial territorial operation over irregular routes, because, at the points where appellant can pick up or discharge its passengers, it can operate over any road to any point within the authorized territory.

This Court has recognized the fact that a route is an irregular route under such conditions even though a part of the distance is always traversed over a particular highway.

In the case of

United States v. *Maher*, 307 U. S. 148,

the Court said, at page 155, that:

> "The appellee had been engaged in quite different services from those for which it asked a certificate, namely, an irregular, so-called, anywhere-for-hire operation in Oregon with occasional trips to points in Washington over any route adapted to a particular trip, *but using at least for part of the distance U. S. Highway 99 on trips to Washington. These irregular operations were discontinued after the appellee's regular route was established.*" (Italics ours.)

The Court in that case then proceeded to deny the application because the operator had abandoned the irregular route operations which had used one road for part of the same and substituted, in lieu of such irregular operations, a regular route, without Commission authority.

Thus this Court has answered the claim of appellant herein by declaring that an irregular route remains an irregular route even though for a portion of it the same highway may regularly be used.

Appellant further claims (p. 32 of its brief) that the opinion of the Court below permits it to operate between fixed termini. The lower Court did not so hold. It merely, in effect, stated that if appellee picked up a passenger at its ticket store or office in New York City to take to some hotel in the mountain area, such a pick up would not violate the door to door description prescribed by the Commission, and that this would naturally apply in the reverse direction. Nothing therein contained could be considered to permit the appellant to regularly run between fixed termini because then it would be conducting a regular route operation between fixed termini. If, on different occasions, a passenger might want to be picked up at a particular spot in New York City, and carried to another particular spot in the mountains, the mere fact that this happened a number of times would not change the character of the door to door service rendered by appellant, and would not authorize regular route operation between fixed termini.

A taxicab in New York City frequently carries people from one address on Fifth Avenue to another address on that avenue. That does not change the taxi to a regular route operator between fixed termini.

The claim of appellant that it operated between fixed termini (its brief, p. 32) is not borne out by any of the evidence, and its own application above referred to and the affidavits presented in support of that application (R. 64-76) show the operation to have been an irregular route and not a regular route operation between fixed termini.

Appellant knows what it can operate if it wishes to continue the same type of operations conducted on the Grandfather date. It does not wish to do that, but wishes to change to a regular route bus operation between fixed termini, and it has no right in law or in justice so to do.

Appellant's complaint that the Commission improperly described its service as a door to door service is not borne out by the record. Instead the record adequately supports this specification by the Commission, and appellant's evidence submitted to the Commission in the form of affidavits (R. 64-76) shows that the service rendered was a door to door service in which people were taken from their homes in New York City to hotels, boarding houses and clubs in the mountain area. In fact, these affidavits praise the service because it did that very thing which regular route carriers did not do, and took "people to hotels located in all roads and by-roads" (R. 64). Likewise the advertisements submitted to the Commission as exhibits showed that appellant held itself out to take people (R. 80)—

"From Your Home to Your Hotel."

The service was a personalized service, and it remains door to door whether the person be picked up at his own home or after shopping in the down town section should request to be picked up at a store or office in the shopping district.

Appellant's objection to the action of the Commission in specifying its Grandfather operations, and therefore its authorized operations, as "non-scheduled operations", has no basis in fact or in law.

The record (see affidavits submitted by appellant as proof, R. 64-76) shows the type of operation to have been a personalized, non-scheduled operation in which people were picked up to suit their convenience. The affidavit of Mr. Feldman refers to that type of service as extremely convenient (R. 69), and the same is true with reference to the affidavit of Adela Dingelthal (R. 73). Furthermore, such type of interstate livery service is of necessity non-scheduled if it is to fulfill its true purpose

and play its part in the national scheme of adequate transportation.

Appellant's claims (at pp. 33 and 34 of its brief), that the Commission has not included the words non-scheduled in defining other special types of operations are without weight because each case must stand upon its own facts.

Appellant's questioning the power of the Commission to include such a definition because the statute does not specifically authorize the same is likewise without merit. If the Commission were confined to the exact words in the statute, it could never carry out the legislative mandate to specify the service to be rendered.

Appellant's claim that the Commission and the Court erred in classifying its operations as "special operations" is hard to understand. All operations in the case of passenger certificates are of necessity either regular route operations between fixed termini, or special operations. This is not true of property carriers as distinguished from passenger carriers, because there the certificate may authorize either operation over regular routes and between fixed termini or between territories to be served without specifying the latter as special operations. The reason that in passenger cases all authorizations other than over regular route and between fixed termini must be classified as special operations is that provision in Section 207(a) of Part 2 of the Interstate Commerce Act (United States Code, Title 39, Section 307(a)), where the statute reads:

> "Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes and between fixed termini, *except* as *such carriers may be authorized to engage in special or charter operations.*" (Italics ours.)

There is nothing in the designation "special" which in appellant's case can prevent it from selling individual passage to different people in the same sedan vehicle. The examples cited in appellant's brief, page 36, of special operations authorized by the Commission are not all inclusive but rather are examples of proper specification of operations permitted by the Commission. Each case is determined by its own circumstances of proof.

The lower Court properly interpreted the Commission's definition of special operations.

Appellant's contention, at page 39 of its brief, that the above quoted proviso contained in Section 207(a) does not apply to Grandfather operations is error. That Section provides for the issuance of certificates.

The Grandfather Section, 206(a), merely dispenses with the proof of necessity and convenience otherwise required under Section 207.

The record supports the action of the Commission in defining and specifying appellant's authorized service as irregular route, door to door, non-scheduled, special operation. It is within the province of the Commission to exercise its expert judgment upon the facts and use such language as will carry out the legislative mandate to specify the service.

In the case of—

Noble v. *United States*, 45 Federal Supp. 793,

the United States District Court for the District of Minnesota, in referring to this point, said:

> "This means that the Commission could select the language and the method of specifying the scope of the business. Unless the Commission had such authority, it cannot carry out the announced policy of Congress."

That case was appealed to the United States Supreme Court and affirmed, and this Court, in that same case, 319 U. S. 88, 63 Supreme Court Reporter 950, said:

> "Since the Commission did not apply an incorrect standard in defining the nature of appellant's business and its scope, our function is at an end. The precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been reserved for the Commission."

In the case of—

> *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475,

this Court said:

> "We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission."

The Commission acted within its lawful authority in defining appellant's service.

POINT III.

Appellant contends that the Commission erred in making its order of September 2, 1941 because it did not hold a hearing between that date and June 20, 1938, the date of its previous order, which had been protested, and which therefore never became effective.

There was no reason for the Commission to hold any further hearing. No request was made for any further hearing by the appellant or its predecessors.

Appellant's contention on page 6 of its brief that the Commission should have held a hearing because protestants in their protests had questioned the evidence adduced by applicant is certainly not a claim appellant can properly make. If anyone was injured, it was protestants, and they are not complaining but rather supporting the Commission's action. The Commission accepted the undisputed evidence of appellant and its predecessors at its face value and applied the law as it was determined on September 2, 1941. There were no factual questions at issue of which appellant can complain because its evidence was accepted at full face value and remains undisputed. The issue which was being contested during the years 1938 to 1941 was a legal issue, and appellant was given ample opportunity to argue this issue before the Commission. It did that very thing, first, in its protest and supporting brief, dated October 7, 1941 (R. 117-119), and, after Division 5 of the Commission had disagreed with it, appellant again had the opportunity to argue this question before the entire Commission in its petition for reconsideration by the entire Commission, filed April 6, 1942 (R. 132-136). When the entire Commission disagreed with appellant, it again re-argued the matter before the Commission in its petition to re-argue, filed October 10, 1942 (R. 158-161).

Since the issues were legal rather than factual, there was no reason for any further factual hearing, and the Commission gave appellant ample opportunity to argue the legal point involved.

Appellant had never obtained a certificate. Its proceedings were pending before the Commission, and its compliance orders of 1938 never became effective because of the filing of protests against them, and the Commission, when it finally determined the case, properly acted under the proper and lawful interpretation of the statute as

then made. The long delay in finally determining the case was the result of differences in opinion within the Commission, which were only fixed and determined by the long *Nudelman* litigation, which concluded in 1941. Appellant was not prejudiced because the Commission has given to it everything which it asked for in the application filed by its predecessors and everything to which it is lawfully entitled.

Appellant, at page 40 of its brief, apparently misconstrued the compliance order of June 20, 1938, and fails to recognize it as merely a step in the proceedings which was nullified by the timely filed protests. It never vested in appellant any rights because the Commission had not made its final determination. It was more like a pleading in a cause rather than any decree therein.

The Commission had to issue the correct order because the law in 1941 had been determined. This Court has held such to be the requirement by analogy in the case of

Ziffrin, Inc. v. *United States*, 218 U. S. 73, 63 Supreme Court Reporter 465.

In that case, the Court said:

> "We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered. • • • Previously appellant had been operating under an *ex parte* permit. • • • A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law. • • • *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts."

The action of the Commission was not only proper, but it was the only action which the Commission could have lawfully taken.

Conclusion.

Appellant's contentions strike at the very root of the Interstate Commerce Commission's ability to continue public regulation of motor carriers. If its contentions were to be accepted, regulation of such carriers would to a major degree be destroyed. Such an interpretation would thus destroy the expressed intent and purpose of the Act. Therefore it cannot be the correct interpretation.

The action of the Commission is supported by appellant's own undisputed proof, and, based upon that evidence, the Commission applied the law as this Court itself has interpreted it in the cases herein cited.

The action of the Commission and the action of the lower Court in dismissing appellant's complaint should be affirmed.

Respectfully submitted,

JAMES F. X. O'BRIEN,
Attorney for and of Counsel with Appellee, Hudson Transit Lines, Inc.

Dated: November 1, 1943.

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No. 65

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

CRESCENT EXPRESS LINES, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR MOUNTAIN TRANSIT CORPORATION, INTERVENOR-APPELLEE

HENRY P. GOLDSTEIN,
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New York, N. Y.

Dated, November 8, 1943.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 65

CRESCENT EXPRESS LINES, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., *et al.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR MOUNTAIN TRANSIT CORPORATION, INTERVENOR-APPELLEE

Opinion Below

The opinion of the District Court (R. 30-36) is reported in 49 Supp. 92.

Jurisdiction

The jurisdiction of this Court is invoked on direct appeal taken under Section 210 of the Judicial Code, Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat.

220, U. S. C. A. Title 28, Section 47a. The decree of the District Court dismissing the complaint was dated February 27, 1943 and was entered on March 6, 1943 (R. 28). The order allowing appeal was entered on April 16, 1943 (R. 36). On or about May 7, 1943, appellees, the United States of America and Interstate Commerce Commission filed a joint motion to affirm. On or about May 5, 1943, intervenors, Hudson Transit Lines, Inc., and Mountain Transit Corporation filed statements opposing the jurisdiction of this Court and motions to affirm. This Court, on June 7, 1943, postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 170).

Statement of the Case

This is a suit filed by plaintiff to set aside orders of the Interstate Commerce Commission so as to reinstate a prior order. The orders sought to be set aside are: (1) an order dated September 2, 1941 (R. 115-117), awarding to the applicant a certificate of convenience and necessity as described therein and setting aside a previous order dated June 20, 1938 (R. 103), covering the same facts; (2) an order dated March 17, 1942 (R. 142), denying a petition objecting to the order of September 2, 1941; and (3) an order dated July 13, 1942 (R. 158), denying petition filed by applicant against the order issued March 17, 1942.

The order dated September 2, 1941 (R. 115-17), authorized the issuance of a certificate of public convenience and necessity subsequent to further consideration in the pending proceeding before the Commission (Docket No. MC-78980) as follows:

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in

interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

The said order also directed that the previous order issued in this proceeding describing the authority to which applicant has been found to be entitled be vacated and set aside.

The pertinent facts in the proceedings are as follows:

Herman Trevax, Jacob Vangrofsky, Murray Galley and Morris Glickman, a partnership doing business as Crescent Mountain Service, filed BMC-A application on February 12, 1936 (R. 43), and on March 26, 1937, filed a BMC-A2 form (R. 46) in which it set forth in detail the type of operation which it conducted and for which it sought authority. (It even went so far as to indicate that because of its operations of sedans, that it was exempt from any and all provisions of the Motor Carrier Act and that the filing of the application should not be deemed a waiver of its rights thereunder.) In the Exhibit A attached thereto (R. 47-48), the applicant claimed that it went from New York City via the George Washington Bridge to Suffern and Wurtsboro, where traffic was distributed to the summer resorts within a radius of 20 miles

from Woodbourne, N. Y. There was annexed (R. 49) a map indicating the New York area and the manner in which the applicant traveled to the area in and Wurtsboro and indicated by a large irregular circle as the area served by it. Attached to the exhibits was a card which read as follows (R. 82):

"7 Passenger Cars
Leaving Daily to All Parts of the Mountains
At Lowest Rates
(a number of places were listed)
From Your Home to Your Hotel
Boarding And Rooming Accommodations if desired.
Please Call to See Us at Our Residence
About Reservations.
CRESCENT MOUNTAIN SERVICE
531 East 169th Street."

There was no claim made for intermediate points below the mountain area.

On May 7, 1938, a compliance order (R. 99) was issued and on June 20, 1938, corrected compliance order (R. 103) was issued which was in conformance with the then existent practice of the Commission. The corrected order is that in the complaint (R. 12). Please note that in accordance with the application this order limited the operating authority in the mountain area to "intermediate and off-route points within 20 miles of Woodbourne", whereas the previous order, which had been vacated or which had been corrected and which had been dated May 7, 1938, had read, "All Intermediate Points" and then "Off-route points: Points and places within 20 miles of Woodbourne." In other words, the Commission, when it issued its compliance order of May 7, 1938, had at first improperly described the intermediate points and then issued its own corrected order of June 20, 1938, which is

the order that the applicant would like to remain in force and effect, to indicate that the intermediate and off-route points were only within 20 miles of Woodbourne.

On June 28, 1938, Exceptions (R. 105) were filed by protestants to the order of June 20, 1938, wherein it was stated, amongst other things: (a) that no regular route operation was operated in the year of 1935; (b) that no business of any kind was done by the applicant or any of its alleged partners at any time at points between New York City and Wurtsboro, N. Y., or the so-called "points in the mountains"; (c) that the applicant or any of its alleged partners did not do any business to all of the points and places within 20 miles of New York; and (d) that the applicant or any of its alleged partners at no time operated between fixed termini.

Prior to the issuance of the compliance, orders, order to show cause had been served upon the partnership applicant to dismiss the application for failure to prosecute (R. 89). An appearance was then made at informal hearings by an attorney representing the applicants (R. 97); the application was referred to the District Office of the Interstate Commerce Commission for further investigation and informal hearing and conference with the applicants. At the informal hearings before a District Supervisor, additional proof of operation, in the form of affidavits and oral statements, were submitted (R. 97). It was based upon the sworn statements in the BMC-A, the BMC-A2, the affidavits, and additional proof that the compliance order of June 20, 1938 was issued. These affidavits were made by persons in support of the application (R. 64 through 76).

In addition to the affidavits as aforementioned, there were submitted the books indicating the manner in which

the partnership conducted this business which were diaries showing reservations for passengers (R. 77-78). At no time was there ever produced any schedules of operations or any proof of operation of a regular route terminal to terminal operation, nor any advertisements, holding outs, leases, or other evidence indicative of such an operation.

Upon all of this proof, the Commission issued the compliance order of June 20, 1938, limiting the applicant's service to points in New York City, on the one hand, and intermediate and off-route points within 20 miles of Woodbourne, on the other, and described a regular route as the method of operating between New York City and the area. Exceptions of protestant being duly filed to the order of June 20, 1938, the Commission then had before it the complete record upon which it would have to make a determination as to the authority which the applicant was entitled to. There never was a dispute as to the facts.

After the filing of the Exceptions by protestants to the order of June 20, 1938, the proceedings were again referred back to the Commission District Office for further informal investigation and on October 31, 1938, District Supervisor D. V. Grant of New York addressed a letter to the applicant's predecessors advising them (R. 121):

> "Upon specific complaint, the finding made by this Commission in the matter of your 'grandfather' rights has been stayed and the application returned to me for further informal investigation and report."

They were requested to be present on December 1, 1938, at which time protestants were also present.

At the informal conference on December 1, 1938, no additional data was submitted over and above that originally given to the Examiner and that data consisted of evidence of sedan movements over irregular routes in a door-to-door service, between points in New York City, on the one hand, and specific points in Sullivan and Ulster Counties, on the other.

While these proceedings were pending, the Commission had before it 58 applications involving the identical territory, type of operation, and the question as to the type of service to be described in any certificate to be issued to the operators of such service. These cases were consolidated by the Commission and were known by it as *Irving Nudelman, Common Carrier, MC-86772, et als.* (22 M.C.C. 277 and 28 M.C.C. 91).

On March 20, 1940, the Commission submitted its report in the *Nudelman et als.* cases. On February 25, 1941, the Commission, Division 5, on reconsideration, submitted its further report in the *Nudelman* cases, wherein they found that applicants were engaged in special seasonal operations as common carriers by motor vehicle of passengers and their baggage, between New York, N. Y., or portions thereof, on the one hand; and Sullivan and Ulster Counties, N. Y., or portions thereof, on the other, over irregular routes through New Jersey, by describing the authority as special operations in nonscheduled door-to-door service, limited to the transportation of not more than 6 passengers in any one vehicle, but not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats.

On September 2, 1941, the order (R. 115-117), attacked herein, was issued which merely substituted a description

of applicant's type of service rendered on June 1, 1935, in conformity with the Commission's determination in the *Nudelman* case in the place and stead of its previous description of the type of authority as contained in the order of June 20, 1938 (R. 103) which applicant seeks to have remain in force and effect.

On October 9, 1941, applicant, a corporation succeeding (R. 112) to the interests of the partnership, filed a protest and petition to stay issuance of the certificate authorized in the order of September 2, 1941, wherein they urged that said order was issued without notice (R. 116); that it changed the content of the previous compliance order so as to direct a non-scheduled door-to-door service over irregular routes with vehicles having no more than 6 passengers; and that the real issue was whether the Commission had the right to restrict a carrier to vehicles of the sedan type. This petition was filed 37 days after September 2, 1941, although the order of September 2, 1941, directed that Exceptions thereto by the applicant should be filed within 30 days therefrom.

Said petition requested that the order be vacated and set aside and the compliance order of June 20, 1938, reinstated. No issue was made therein as to the facts, nor was any request contained in this petition. Said petition was denied on March 17, 1942 (R. 131).

On April 3, 1942, applicant filed petition for reconsideration by the entire Commission and/or to reopen and grant a hearing (R. 132). It was repeated therein that no hearings to support the new order were had and that there was no evidence taken to support the change in the order previously issued on June 20, 1938. The said petition went on further to state: "The only evidence in the record is that taken at the ex parte hearing which was sufficient to support the compliance order of June 20, 1938, or

the same would not have been made"; that the restrictions in the order of September 2, 1941, were contrary to statute and that the alleged limitation and restrictions were in violation of Section 208 (a) of the Motor Carrier Act, to the effect that any certificate issued should not restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate as the development of the business and the demands of the public should require. This petition was denied by the entire Commission by its order of July 13, 1942 (R. 158).

Summary of Argument

The appellant's argument consists of six points which could well be summarized in two. Five of these arguments concern themselves with the authority of the Interstate Commerce Commission, pursuant to Section 208 (a) of the Motor Carrier Act, to specify in any certificate issued under Section 206 or 207 of the Act "the service to be rendered" and in so doing whether they may specify a particular type of service to be (a) special operations; (b) limited in a door-to-door service; (c) to irregular routes; (d) to non-scheduled operations; and (e) to the transportation of not more than six passengers in any one vehicle excepting children under ten years of age who do not hold a ticket. The aforementioned could well be one point and the argument that there is no evidence to support the Commission's findings in the order of September 2, 1941, could well be the second point. Appellee therefore urges that (a) the Commission has the power to specify the service rendered as it did herein; and (b) that its findings in the order of September 2, 1941, are supported by substantial evidence.

Statutes Involved

The following sections of the Interstate Commerce Act are pertinent herein:

"Sec. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicles subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, However, That,* subject to section 210 if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the applica-

tion for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful * * *.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other

than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208. (a) Any Certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Section 204(a) (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; * * *

Sec. 205(h). All the provisions of section 17 of part I shall apply to all proceedings under this part.

Sec. 17. (3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

ARGUMENT

POINT I

Pursuant to Section 208 (a) of the Motor Carrier Act, the Commission must specify "the service to be rendered" in any certificate issued under Section 206 or 207 of the Act.

The appellant's arguments, Points one through five, involve the power of the Commission pursuant to Section 208 (a). The appellant in urging its position has attempted to indicate that the Commission has imposed five different restrictions. The Commission, however, did not impose restrictions but in specifying the service to be rendered, as it is required to do under the Act, described in detail the type of service which the applicant's predecessor had been rendering on June 1, 1935, and presumably continuously since.

There is hardly any dispute as to the facts. The Commission, before issuing its order of September 21, 1942, (R. 115), had withheld a determination on the Exceptions of protestants to its previous order of June 20, 1938 (R. 103) because of the pendency before it of the identical question involved in the *Nudelman* case (22 M.C.C. 277 and 28 M.C.C. 91). After its final determination in respect to the particular subject, it made its order attacked herein. We therefore revert to the Commission's own statement of position in respect to its authority as contained in that case.

In the *Nudelman* case (22 M.C.C. 277), the Commission in its first report described the service rendered as "seasonal service for the transportation of passengers and their baggage in 7 passenger sedans between New York City, or portions thereof, on the one hand, and summer resorts in the Catskill Mountains, hereinafter referred to as the Mountains, in Sullivan and Ulster Counties, on the other." It stated further that the type of service rendered was as follows:

> "That generally the applicants operate door-to-door, not over fixed routes, nor between fixed termini, and not on fixed schedules; that they do not pick up or discharge passengers in the State of New Jersey; that the fair paid by each passenger each trip is subject to oral agreement between such passenger and the carrier, and no written contracts are entered into; and that passengers are transported by motor vehicle across State lines upon and over public highways for compensation." (22 M.C.C. 277).

In its report on reconsideration and final determination, 28 M.C.C. 91, 93-95, it stated:

> "Upon further consideration we are of the opinion that our prior construction of Section 208(a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, 'the service to be rendered,' subject to the proviso that we cannot restrict the right of a carrier to 'add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require.' In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach

maximum limitations to the quantity of the service to be furnished. This construction is in line with our decision in *Pittsburgh-Weirton Bus Co., Inc., Com. Car. Application,* 10 M.C.C. 266, wherein we discussed the meaning of the proviso in question. In that case, the issue was presented as to whether that applicant had inaugurated a new operation by increasing its service between 2 points from 1 round trip daily to 250 one-way trips daily. In deciding that question in the negative, we construed the proviso of section 208(a) to mean (page 270):

> This prohibition protects the right of the carrier to expand not only its 'equipment' but also its 'facilities.' The only purpose of such expansion is to enable the carrier *to provide more service,* and this is very clearly indicated by the words 'as the development of the business and the demands of the public shall require.' It follows that 'terms, conditions, or limitations' in the certificate restricting *the service* of the carrier would be wholly inconsistent with this proviso. (Emphasis supplied.[1])

We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the service to be rendered. What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its service to meet the demands of the public.

With this exception, our power to specify in any certificate we issue the service to be rendered is complete. For instance, in *Schwerling Common Carrier Application,* 23 M.C.C. 459, we required the applicant carrier to maintain a schedule of not less than one round trip per hour during certain

1. In this report, wherever quoted words or phrases are italicized, it is to be understood that such emphasis is supplied.

periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment. For example: In *Miller Extension of Operations*, 21 M.M.C. 401 (prior report, 12 M.C.C. 457), the authority granted therein was restricted to liquid petroleum products in tank trucks; in *Myers Common Carrier Application*, 23 M.C.C. 451, authority was restricted to driveaway service; in *Central Truckaway System, Inc., Com. Car. Application*, 19 M.C.C. 713, authority was restricted to truckaway service; in *Parcel Delivery Service, Inc., Contract Carrier Application*,[2] 8 M.C.C. 275, authority was granted to transport packages and parcels of merchandise by motor vehicle 'the equipment being limited to motorcycle traffic cars, with panel bodies'; in *Billy Baker Co., Common Carrier Application*, 24 M.C.C. 805, authority was granted to transport, among other things, cement in dump trucks; and in *Barrows Common Carrier Application*, 19 M.C.C. 179,[3] authority was restricted to the transportation of not more than six passengers per trip. Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted.

Because we have the power to restrict a carrier to the use of certain types of vehicles, in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits."

2. Although this application was later dismissed for reasons not pertinent herein, the same applicant on April 10, 1939, was issued a certificate containing the same restrictions pursuant to *Parcel Delivery Service, Inc., Common Carrier Application*, 13 M.C.C. 15.

3. No exceptions to the order recommended by the joint board in this case were filed, and, not having been stayed or postponed by us, it became effective as our order by operation of law.

By virtue of the determination in the *Nudelman* case the Commission, by its order of September 2, 1941, merely authorized the issuance of an appropriate certificate properly describing the service rendered by plaintiff's predecessors upon the evidence and facts before it. Plaintiff does not dispute or deny the facts and method of operation. It attempts to confuse the issue by stating that the order of September 2, 1941, limits the holder of the certificate to the use of sedans in contravention of that portion of Section 208(a) which permits a carrier to increase or decrease its service as the demands of the business may require. The Commission in the *Nudelman* report, heretofore recited, has fully discussed its position in respect thereto. Simply stated, it merely means that once a certificate is issued, whether it be pursuant to Section 206 or 207 describing the type of service to be rendered, then there shall be no limitation as to the quantity of that type of service.

The Commission must, in the issuance of a certificate, properly distinguish and describe the service to be rendered. Its description of a door-to-door irregular route non-scheduled service limited to the transportation of not more than a certain number of passengers is a proper method of description of type of operations. The question as to differences in types of operations has been passed upon by this Court.

United States v. *Maher*, 307 U. S. 148, 152-153:

> "On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206 (a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206 (a) from the requirements

of Section 207. The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established."

Page 155:

"The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiation between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory', Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208(a) 49 U. S. C. A. #308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate.'"

Alton R. Co. v. *United States*, 315 U. S. 15, 23:

"Appellant railroad companies also urge that Fleming should not have been awarded any rights under the 'grandfather' clause in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal. Thus there was evidence that on and since June 1, 1935, Fleming had been in bona fide operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the courts."

Rochester Telephone Corporation v. *U. S.*, 307 U. S. 125, 138-140:

"While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act in 1906, and the Mann Elkins Act in 1910, the establishment of similar agencies in many states following the lead of New York and Wisconsin, the widespread recognition that these specific instances marked a general movement, made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This court 'ascribed' to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois Central R.R. v. Interstate

Commerce Commission, 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Recognition of the Commission expertise also led this court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

"From these general considerations the Court evolved two special doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. 'Interstate Commerce Commission *v.* Illinois Central R. R., 215 U. S. 452, 470, 30 S. Ct. 155, 160, 54 L. Ed. 280; Interstate Commerce Commission *v.* Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

Page 146:

"The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body." Mississippi Valley Bargeline Co. *v.* United States, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 693, 694, 78 L. Ed. 1260; Swayne & Hoyt, Lt. *v.* United States, 300 U. S. 297, 303 et seq., 57 S. Ct. 478, 480, 81 L. Ed. 659.

United States et al. *v.* Carolina Freight Carriers Corp., 315 U. S. 475, 480.

"We think the Commission was justified in the restrictions which it placed on the geographic scope of appellee's operations. Sec. 206 (a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor was 'in bona fide operations as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application and has so operated since that time.' Sec. 208 (a) requires that the certificate specify 'the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate.' It is clear from these provisions that the power of the Commission to authorize future operations within a designated 'territory' rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant cases, it may extend to all points in a part of that area, and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. Alton R. Co. *v.* United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. ——. The act, provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to service a specified area

> is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald *v.* Thompson, 305 U. S. 263, 266, 59 S. Ct. 176, 178, 83 L. Ed. 164."

Page 483 says:

> "Sec. 206 (a) requires a showing that the applicant or its predecessor, was 'in bona fide operation as a common carrier' on June 1, 1935, and 'since that time'. By #208 (a) the certificate must specify 'the service to be rendered' by the carrier."

The Commission's action in describing the type of service as it has done herein is not an imposition of restrictions or a delimitation of applicant's Grandfather rights. The Commission having found that the service rendered was not that of a regular route terminal to terminal one, properly specified the type of service to be rendered.

POINT II

The order of September 2, 1941, was made after hearings and with ample evidence in support thereof.

Appellant's brief, page 39 under Point VI, states that the lower Court had ruled that the Commission gave notice of a new hearing before it changed the order of June 20, 1938 (R. 29) and that there is nothing to support such a finding. Reference thereto would indicate that finding of fact No. 6 (R. 29) states:

> "Before changing the certificate granted on June 20, 1938 the Commission gave notice to the plaintiff of a new hearing but it did not take any additional evidence to support the order of September 2, 1941."

The protests in the proceedings before the Commission of Hudson Transit Lines (R. 107, 109) and of Mountain Transit Corporation (R. 101, 103) did not specifically ask for any formal hearing, but, as in all Exceptions of that type, requested the opportunity of submitting evidence in respect to the facts stated by them in the event the Commission deemed the same necessary. The lower court's specific finding of fact No. 6 is proper. The fact that the protestants did not submit any proof is not indicative of the fact that the appellant was not afforded the opportunity of a hearing by the Commission. In fact, the applicant's predecessors were present at a further hearing on December 1, 1938 (R. 121), at which time they saw fit not to submit additional data and relied upon the information already in the docket as contained in the transcript of record herein.

It is not necessary for the Commission to order a formal hearing in all instances in respect to the issuance of certificates. Section 207 (a) of the Motor Carrier Act (pages 11-12 herein) requires that a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing, and able to properly perform the service proposed and to conform to the provisions of Part II of the Motor Carrier Act and the requirements, rules and regulations of the Commission thereunder, and, pursuant to Section 206 (a) (pages 10-11 herein), in instances of Grandfather applicants no proof of convenience and necessity need be submitted.

The administration of Part II of the Motor Carrier Act, pursuant to section 204 (a) (6) (page 12 herein) empowers the Commission to make all necessary orders in connection therewith and to prescribe rules, regula-

tions and procedure for such administration. Pursuant to Section 17 (3) (page 13 herein), the Commission is to conduct its proceedings under any provision of law in such manner as will be conducive to the proper dispatch of business and to the ends of justice. The validity of the proceedings are not affected by the failure of the Commission to conduct a formal hearing. The plaintiff was afforded an opportunity to be heard in person and by an attorney.

Morgan v. *U. S.*, 298 U. S. 468, 481-483.

The procedure of the Commission in respect to the issuance of an appropriate order specifying the service rendered did not deprive the plaintiff of an opportunity to be heard. The procedure provides for the filing of appropriate exceptions and an opportunity to state the position of the person claiming to be affected by the issuance of an order. The appellant herein accepted that procedure (R. 116, 132, 158) and it is noteworthy that upon its Exceptions (R. 119) it stated:

> "The real issue is whether the Commission has the right to restrict a carrier to vehicles of the sedan type."

and further under "Conclusion" (R. 120):

> "The order of September 2, 1941, should be vacated and set aside and the order of June 20, 1938, should be reinstated and all proceedings for the issuance of a certificate pursuant to the said order of September 2, 1941, should be withheld."

In other words, the appellant would urge that if the order which it seeks, June 20, 1938 (R. 103), were permitted to remain in force and effect, then the procedure

of the Commission is proper; but if the order of the Commission does not meet with the appellant's satisfaction, then the procedure of the Commission is improper. As has previously been pointed out, the order of June 20, 1938 (R. 103), is descriptive of the service which the applicant was authorized to render and the order of September 2, 1941, based upon the identical evidence, is a correct description of the service which the applicant is authorized to render, and accordingly it is urged that if the order of June 20, 1938, was properly issued, then the order of September 2, 1941, is likewise proper.

The appellant on pages 40-41 of its brief herein misconstrues protestants' Exceptions in the proceedings before the Commission and would intimate that they are more in the form of pleadings in a Court, which pleadings might require submission of evidence or submission of proof in support thereof. The administrative procedure of the Commission, however, does not require the same and accordingly appellant's argument is meaningless.

The opinion of L. HAND, C.J. in the lower Court (R. 31, 35) very pointedly answers the point raised under argument VI:

> "Finally, we can see nothing improper in the procedure adopted by the Commission in changing its decision; it acted upon the same record and after notice to the plaintiff of a new hearing. True, the interval between the orders were long; but the whole subject was new and confused, and the Commission itself was divided in opinion. The plaintiff was deprived of no right, substantial or procedural, and indeed does not even now allege that any other evidence would have changed the result."

CONCLUSION

It is respectfully submitted that this Court having postponed the question of jurisdiction should now grant appellees' motions to affirm the lower Court's determination.

Respectfully submitted,

HENRY P. GOLDSTEIN,
Attorney for Appellee
Mountain Transit Corporation.

Dated, November 8, 1943.

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SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1943.

Crescent Express Lines, Inc., Appellant, vs. The United States of America, Interstate Commerce Commission, Hudson Transit Lines, Inc., et al.	Appeal from the District Court of the United States for the Southern District of New York.

[December 6, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal brings here for review a judgment of a district court upholding an order of the Interstate Commerce Commission specifying limitations in a certificate proposed to be issued to appellant as a motor carrier.

The order bears the limitations upon its face, as follows:

"The service to be rendered by applicant is authorized by the terms of which that is a part, in interstate or foreign commerce as a 'common' carrier by motor vehicle of passengers and their baggage in special operations in round-trip sightseeing service limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof and not including children under ten years of age who do not occupy a seat or seats during the whole transportation, from June 1st to October 1st, inclusive, over irregular routes, [illegible] between New York, N. Y. and points in Sullivan and Ulster Counties, New York."

Following the enactment of the Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. § 301 *et seq.*, the appellant petitioned for a permanent authority application for a certificate of public convenience and necessity under the grandfather clause of the Act, 49 U. S. C. § 306 a.

It appears from the application and the evidence the appellant's operations began in 1936 when Herman Tenzer [illegible] seven-passenger sedan and began carrying passengers

to summer resorts in the mountains of New York state. Between 1930 and 1933, three others purchased cars, joined Trevax in this business and opened an office in New York. All this was prior to the critical date of June 1, 1935, fixed by § 306(a) to determine the eligibility of applicants for certificates because of their former (grandfather) operation.

The partners advertised "7 Passengers Cars Leaving Daily to All Parts of the Mountains," "From Your Home to Your Hotel." An affidavit stated that the partners would "transport people to hotels located in all roads and by-roads." The owners of several resort hotels stated that the applicant had supplied cars for carrying guests between their hotels and New York City. Former passengers described the convenience of the service and from their descriptions of the trips, it appears that the routes followed were irregular and taken to fit the needs of each passenger. The firm owned no buses of any kind.

On June 20, 1938, the Commission issued an order that it would, on compliance with conditions not here pertinent, grant a certificate authorizing Crescent to operate

"as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive," between New York City and named towns in Sullivan and Ulster Counties, New York, by way of New Jersey.

Protests were filed by several competing carriers, who considered the compliance order too broad. On September 14, 1938, the parties were notified that the objections had been deemed sufficient to warrant referring the case back to the field force for further investigation. An informal hearing, which the applicant did not attend, was held on December 1, 1938.

The Commission then deferred determination of the applicant's rights until the decision of a number of test cases involving carriers performing a similar service. See *Sullivan County Highway Line, Inc., Application*, 21 M. C. C. 717, reconsidered, 30 M. C. C. 133; *Irving Nudelman Application*, 22 M. C. C. 275, reconsidered, 28 M. C. C. 91. In the meantime, the partners sold their business to the present appellant, which was substituted before the Commission by order of October 31, 1940. On Sep-

tember 2, 1941, the second order, providing for a more limited certificate, quoted at the beginning of this opinion, was issued.

(1) Appellant contends that the changes to which it objects in the last order as compared with the earlier were made without proper hearing or evidence. This argument proceeds upon the assumption that the earlier conclusions, as embodied in the 1938 order, endow appellant with something akin to a right to receive ultimately a certificate embodying the terms of the order.[2] However, under § 306 the Commission was directed to issue the certificates to applicants under the grandfather clause without further proof of convenience or necessity and without further proceedings. Its routine practice was to refer the application to its field force for investigation.[3] The applicant appeared before this examiner prior to the first order of the Commission. The compliance order was made upon the application, the supporting affidavits and questionaire. The mass of applications forced this summary procedure.[4] The compliance order gave opportunity to the applicant or other parties in interest to protest its conclusions. The order remains under the control of the Commission. § 321(b). This application was treated in the foregoing manner.

Nothing inimical to the applicant on the protests of its competitors developed from the hearing of December 1, 1938. Applicant protested in writing the order of September 2, 1941, filed a brief in support of its protest and upon the refusal of Division 5 on March 17, 1942, to allow the protest, renewed it before the entire Commission where it was again denied July 13, 1942. At no time has appellant offered to present additional evidence of operations prior to June 1, 1935. It seems plain to us that appellant has been afforded ample opportunity to present its application with all supporting data. In view of these facts, we do not find it necessary to resolve a question as to whether or not appellant had actual notice of the meeting of December 1, 1938.

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[2] These preliminary orders are spoken of as compliance orders. Such a descriptive word is applicable because the orders direct the issue of a certificate in accordance with the terms of the compliance order, if no objection is filed and if the applicant complies with the statutory and regulatory requirements of security for protection of the public, rates, fares, charges and tariffs. 49 U. S. C. §§ 315-317.

[3] 51st Annual Report of the Interstate Commerce Commission, pp. 70-72.

[4] 51st Annual Report of the Interstate Commerce Commission, pp. 67, 68, 71; 55th Annual Report of the Interstate Commerce Commission, p. 110. See Gregg Cartage Co. v. United States, 316 U. S. 74, 84.

(2) A further contention of appellant is that the record "does not support the Commission in restricting the appellant to door-to-door service over irregular routes in non-scheduled operations," which were described as special operations. As the district court's interpretation of the order, that "door-to-door service" allowed the appellant to transport passengers from their office or station in the city as well as from the passengers' residences to the mountains and vice versa, is not challenged, that provision requires no further examination. Evidently from the advertisement quoted on page 2, both of these types of business were sought.

The objection of appellants to "irregular routes" appears to be that only special or charter operations entitle a motor carrier to a certificate for irregular routes. § 307. Therefore, if appellant's operations are scheduled operations between fixed termini as appellant also contends, the order ought to require a regular route. However, we think the evidence is clear that prior to the critical date, June 1, 1935, the operations of appellant were special and non-scheduled. Consequently the insertion of the privilege for irregular routes was correct.

In answer to the inquiry as to whether special or charter operations were conducted prior to June 1, 1935, appellant answered, "no special operations."[5] However, the record shows a number of instances where passengers made individual arrangements for their transportation to and from the mountains. No schedule of arrival or departure appears in the record. Instead of publishing arrivals and departures, routes, stops, et cetera, the advertisements referred to daily trips and asked prospective customers to arrange for reservations. There was convincing evidence that applicant's service prior to June 1, 1935, was special and non-scheduled.

The evidence also is plain that the appellant did not operate between fixed termini. A map was filed with the application showing not a single destination in the mountains but numerous ones, which are described by appellant in its application as follows:

"Applicant obtains its traffic in the Boroughs of Manhattan and Bronx, New York, and transports said traffic to the Counties

[5] The Commission construes "charter" to refer to one contractor taking over all the vehicle for a trip or trips and "special" to transportation services on week-end, holidays or other special occasions when the carrier assembles the passengers and sells individual tickets. Re Fordham Bus Corp., 29 M. C. C. 293, 297, 41 F. Supp. 712.

of Sullivan and Ulster, in the State of New York. On return trips the applicant obtains its traffic in and about Woodbourne, New York, more specifically within a radius of twenty (20) miles from Woodbourne, New York, and transports such traffic to the five boroughs of New York City."

(3) Finally, appellant urges that it is beyond the power of the Commission to limit its operations to "transportation of not more than six passengers in any one vehicle." The freedom is claimed to use buses or other multiple passenger type of conveyance.

Section 208 of the Act, 49 Stat. 543, 552, 49 U. S. C. § 308, provides, with reference to grandfather clause carriers,

"That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."[6]

The scope of the Commission's authority under this section depends upon the meaning given to the word "business." The appellant argues that it would be engaged in the same business if, in lieu of using seven-passenger sedans, it undertook to haul larger numbers of passengers in buses. But the special advantage to the public inherent in the use of small vehicles operating as occasion demands from door-to-door rather than between terminals, sets off the appellant's business from the service provided by regular lines operating heavier equipment. *Irving Nudelman Application*, 28 M. C. C. 91, 95-6. The limitation to six passengers in one load is less restrictive than limitation to a particular type of vehicle since it allows the carrier to employ sedans, open cars, station wagons, or any other suitable motor vehicle. 28 M. C. C. at 96. This allows flexibility in equipment while continuing the same business. 22 M. C. C. 285. The line between six passenger and larger scale operation must be drawn somewhere, and the Commission has fixed it where the appellant con-

[6] The bill as drafted by the Federal Coordinator of Transportation did not contain the proviso. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 47 and 357. The addition was explained by Senator Wheeler, the Chairman of the Interstate Commerce Committee, as follows: "Section 208(a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions, and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208(a) . . . ." 79 Cong. Rec. 5654.

ducted its business on June 1, 1935. The Crescent partnership gave some indication that it appreciated these special differences when in 1938 it proposed to change its name to Crescent Cadillac Service, "for the sake of a better business name," thus emphasizing the commercial significance of the sedan-type vehicle. It appears from the application that Crescent owned no buses; it operated nothing but sedans. To authorize the appellant to change to the business of carrying passengers by bus would alter the position in the transportation system which it occupied on July 1, 1935. *Noble* v. *United States*, 319 U. S. 88.[7]

If the holder of a grandfather certificate for this distinctive door-to-door service could develop his operations so that they would be substantially those of a bus line, the ability of the Commission to carry out its duties of regulation in the public interest would be seriously impaired. Since § 308 requires the Commission to specify the service to be rendered, this could not be done without power also to specify the general type of vehicle to be used. We agree with the Commission that the proviso is a prohibition against a limitation on the addition of more vehicles of the authorized type not a prohibition of the specification of the type. See *Irving Nudelman Application*, 28 M. C. C. 91.[8]

We are of the view that the power of the Commission to limit the certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act. When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing. The right to certificates was limited to those then in bona fide operation "over the route or routes or within the territory for which application is made." 49 U. S. C. § 306.

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[7] The Noble case was a contract carrier application under 49 U. S. C. § 309. Under subsection (b) the Commission was required to specify in the permit the "business of the contract carrier covered thereby."

We held that it was proper to limit the permit so that only shippers who "operate food canneries or meat packing businesses," in particular localities, might be served. This limitation corresponded to the type of trade previously enjoyed by the carrier. The carrier contended for a limitation only as to commodities. The proviso in § 309(b), applicable in the Noble case, covers substantially the same ground as the proviso in § 308 dealt with in the present opinion.

[8] Numerous instances of limitation of type are given in the Nudelman opinion. The rule of the Nudleman case has been applied in Rubin and Greenfield Application, 33 M. C. C. 383, and Greenberg Application, 33 M. C. C. 725. See also Davidson Transfer and Storage Co. Application, 32 M. C. C. 777.

The statute, we have said, contemplated "substantial parity" between future and prior operations. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22. "As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms." *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83. Consequently we held in *United States* v. *Maher*, 307 U. S. 148, that operations over irregular routes did not provide the requisite continuity to support an application for regular service between fixed termini, even when the highway between the fixed termini had been occasionally used for part of the distance in the irregular route operations.

When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, it acts within its power and in accord with the purpose of Congress to maintain motor transportation facilities appropriate to the needs of the public. S. Rep. No. 482, 74th Cong., 1st Sess. If there is a need for a different type of service for this transportation, applications may be filed under § 307.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.